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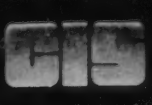

S. HRG. 99-386

CONSTITUTIONAL AMENDMENT RELATING TO SCHOOL PRAYER

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S.J. Res. 2

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO VOLUNTARY SILENT PRAYER OR REFLECTION

JUNE 19, 1985

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CONSTITUTIONAL AMENDMENT RELATING TO SCHOOL PRAYER

WEDNESDAY, JUNE 19, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Grassley, DeConcini, Simon, Denton, and Thurmond.

Also present: Stephen Markman, chief counsel and staff director; Randall Rader, general counsel; Robert Feidler, minority chief counsel; Diane Stark, clerk; Lisa Johnson, clerk; Craig Thorley, Roger Moffitt, and West Doss.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, today's hearing marks the seventh day of hearings of the Subcommittee on the Constitution over the past 3 years on the subject of the proposed amendment to the Constitution relating to voluntary school prayer. In particular, this hearing comes in response to this month's Supreme Court decision in *Wallace* v. *Jaffree* in which the Court held unconstitutional a silent prayer statute enacted by the State of Alabama.

During the 98th Congress, this subcommittee reported out two separate constitutional amendments relating to school prayer. This marked the first time since the *Engel* and *Abington* decisions in the early 1960's that a committee of Congress had reported out such a proposal. The debate that ensued on the Senate floor was, in my judgment, a thoughtful one, and a long overdue congressional debate.

Now, this debate focused upon a proposed constitutional amendment drafted by the Reagan administration which sought to restore the right of school districts to establish periods of voluntary vocal prayer. This proposal was ultimately supported by a 56-to-44 vote in the Senate, but it fell 11 votes shy of the requisite two-thirds majority vote required under our Constitution.

A companion amendment, however, was also part of the agenda and was also reported out of this committee, but was never accorded an opportunity for debate at that particular time. This proposal,

sponsored by the distinguished chairman of this committee, Mr. Thurmond, the distinguished ranking member of this subcommittee, Senator DeConcini, and myself, would have permitted only the exercise of voluntary silent prayer. This amendment is embodied at present as Senate Joint Resolution 2. As a result of the controversy generated by the *Wallace* v. *Jaffree* case, it is my expectation that today's hearing will focus upon the question of a silent prayer constitutional amendment.

I do not intend to bring out the vocal prayer amendment, it having had its opportunity last year. I will not argue the case for a proposed amendment, except to suggest that the policy and constitutional considerations involved in such an amendment are substantially different in important respects from an amendment permitting vocal exercise in school prayer.

I would call to the attention of my colleagues the thorough committee report prepared on this subject during last year's committee consideration.

[The text of S.J. Res. 2 and Senator Specter's prepared statement follows:]

II

99TH CONGRESS
1ST SESSION

S. J. RES. 2

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection.

IN THE SENATE OF THE UNITED STATES

JANUARY 3, 1985

Mr. HATCH (for himself and Mr. DECONCINI) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.".

PREPARED STATEMENT OF HON. ARLEN SPECTER A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

I oppose S.J. Res. 2, which would amend the U.S. Constitution to permit silent prayer in school, because I believe it is unnecessary since it is now permissible to have such silent prayer.

The opinions of the members of the Supreme Court in the case of *Wallace* v. *Jaffree*, 105 S.Ct. 2479 (1985), make clear that silent prayer in school is permissible under the Constitution.

In *Jaffree*, the Court struck down an Alabama statute which provided for a daily period of silence in all public schools for meditation or voluntary prayer. The Court made clear, however, that the basis for its holding was the clear evidence of an improper purpose on the part of the Alabama legislature in enacting the statute. In effect, the Court said that although Alabama professed neutrality in the matter of religion, the legislative history made clear that Alabama, in fact, had enacted the moment of silence law for the sole purpose of advancing religion. Under previous Court decisions, proof that the State's law had no secular purpose required that it be held unconstitutional.

The various Justices' opinions make clear that moment of silence statutes like Alabama's certainly could have legitimate secular purposes; and they state—albeit in dicta—that such a statute would be upheld as constitutional.

Justice O'Conner, in her concurring opinion in *Jaffree*, stated that it was only the peculiar legislative history of the Alabama law which caused her to deem it unconstitutional. Noting that "moment of silence laws in other states do not necessarily manifest the same infirmity," 105 S.Ct. at 2496, Justice O'Conner emphasized that "even if a statute specifies that a student may choose to pray silently during a silent moment, the state has not thereby encouraged prayer over other specified alternatives." Id. at 2499. Thus Justice O'Conner already would uphold as constitutional the very type of law S.J. Res. 2 seeks to "legalize."

Justice Powell "agree[d] fully with Justice O'Conner's assertion that some moment-of-silence statutes may be constitutional." Id. at 2493. And the three dissenting Justices—White, Burger, and Rehnquist—made clear that they would have upheld even the Alabama prayer statute in question.

Thus, 5 of the 9 Justices stated that they would uphold as constitutional a carefully drafted and properly conceived statute providing for a moment of silence, during which a student could pray silently, meditate, or do nothing at all. As Justice Powell noted in his concurring opinion, even the Court's opinion (written by Justice Stevens) suggests that conclusion. Id. at 2493.

During private conversations with Charles Fried attendant to his confirmation as Solicitor General of the United States, I had occasion to discuss my reading of the opinions in *Jaffree*. Mr. Fried concurred in my judgment that the various opinions in *Jaffree* indicate that a majority of the Court would uphold moment of silence statutes as constitutional, if properly drafted and motivated.

In this context, I think a constitutional amendment is inappropriate. If not plainly unnecessary, an amendment certainly is premature: amendment of the Constitution should, at a minimum, be reserved for situations where the Court has spoken clearly and finally, and there is no recourse other than the amendment process. The opinions in *Jaffree*, if they do nothing else, make clear that the Court has not definitively ruled against moment of silence statutues and voluntarily silent school prayer.

Because I believe it presently is permissible under our Constitution, I oppose S.J. Res. 2 at this time.

Senator HATCH. We are fortunate to have with us today an excellent panel of witnesses, of widely varying perspectives, who will assist us in the consideration of this extremely important issue. We thank each of them for being with us this morning and look forward to their testimony.

We are going to call upon two Members of Congress, for 5 minutes of testimony each, at the beginning of this hearing, and then we will move to our panel of four eminent scholars in this particular area.

Our first witness will be the distinguished Member of Congress from Ohio, Representative Thomas Kindness. Representative Kindness is a member of the House Committee on the Judiciary, and is

the principal sponsor of President Reagan's school prayer proposal in that body.

Our next witness will be the distinguished Member of Congress from Texas, Representative Joe Barton. Representative Barton has also been a leader in the effort to secure a constitutional amendment relating to school prayer.

We would like you gentlemen to take your seats, and then I am going to turn to the distinguished ranking member on this committee, Senator DeConcini, for his opening statement.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much. I am going to be brief.

First I want to compliment you, Mr. Chairman, for your diligent and persistent effort to restore silent prayer. I only wish that the Senate and administration had taken your sound advice last Congress when we introduced Senate Joint Resolution 212.

Unfortunately, last year we did not have the administration's support to enable us to succeed; even though, it was obvious that the President's vocal prayer amendment was not going to pass.

So, Mr. Chairman, my hat is off to you for bringing silent prayer back in a timely way.

The Supreme Court has recently held that States may not endorse religion, even in the form of silent prayer, in our public schools. We are a Nation of religious people; the evidence surrounds us in our coinage, in our national anthem, in our Pledge of Allegiance; our faith in God, expressed through prayer, is richly engrained in American history. The purpose of the first amendment establishment clause was not to erect a wall of separation between the States and religious expression. Its purpose was to prevent the establishment of a preferred religion by the State and to maintain the proper supportive role between the State and expression of religious values. The courts have transformed the original intent of the establishment clause that Congress shall be neutral regarding competing religion views and to a notion of neutrality between religion and irreligion. Congress must now restore the traditional understanding of the first amendment's establishment clause by passing an amendment to the Constitution clearly stating the nature of these rights.

Mr. Chairman, I think Senate Joint Resolution 2 does just that. It allows individuals to remain totally neutral and not feel compelled to participate in religious activities. At the same time, it provides constitutional protection for those who wish to engage in silent prayer.

I look forward to the silent prayer hearings, and I hope that we can keep the amendment on track. Also, I am pleased, Mr. Chairman, that you are not going to continue to hold hearings on the vocal prayer amendment because I think, as you do, that we must proceed with an amendment that Congress will accept.

Thank you, Mr. Chairman.

Senator HATCH. Well, thank you, Senator. I appreciate your kind remarks.

Another eminent member of our committee, Senator Simon, we will turn to you at this time.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. I thank you, Mr. Chairman.

I am afraid I am going to be a minority on this question here today, Mr. Chairman. I agree with Senator DeConcini, Thomas Jefferson's phrase, "a wall of separation," that was used simply in a letter to a Baptist minister, is not an apt description. But I think that we have to be very, very careful. There are things that Government can do well, like providing education assistance to students, or building highways. There are things that Government cannot do well, and one of those is to promote religion.

I understand the yearning that people have for ideals and moral values. My father was a Lutheran minister. But I think we have to be awfully, awfully careful in this area. And this does not apply to your immediate bill, but there are obviously people who are dissatisfied because, as Senator DeConcini said, it does not go into the spoken prayer. I remember my former House colleague, a colleague of Congressman Kindness, Dan Glickman, who represents the Wichita, KS, area, telling about when he was in the fourth grade, and every morning he was excused from the room while they had a prayer—Dan Glickman happens to be Jewish—and every morning, after the prayer, he was brought back in. Every morning, all the other fourth graders were being told, "Danny Glickman is different," every morning, Danny Glickman was being told, "You are different." I do not think that ought to happen in a democracy, and it should not happen whether it is a spoken prayer or if it is a mandated silent prayer.

I think we also fool ourselves into confusing symbols of religion and religiosity with genuine religion. And we too easily, particularly in the arena of politics, want to wrap ourselves in the symbols and the religiosity, rather than looking to the genuine product. Our homes, our churches, our synagogues, are the place where we ought to be promoting religion.

I think there are things that we can do that are completely neutral, where Government can provide assistance—for example, tax deductibility. But we provide that to Christians, to Jews, to Buddhists, to Moslems, to the atheists, to anyone. In this area there is real neutrality. That, it seems to me, is the proper role for Government.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator.

I think that your analogy of Dan Glickman is a very good one because Congressman Glickman, in spite of being exposed to vocal prayer, has wound up as a Congressman in the U.S. Congress.

And I might mention, I think the issue here—and I might also say that that is the beauty of the silent prayer amendment, because it is silent prayer or reflection, which allows any religious person to pray in any manner he feels, silently, and does, I think, do something that is very important in this country. What silent prayer reflection will do is it will end the governmental prohibition

against school prayer, and I think, end the controversy. To me, that is what is more important than the form of prayer. But those who do not want to pray can merely reflect.

So, I think that it covers everybody, and I think Senator DeConcini made a pretty good point in his case.

And I might add, under the silent prayer reflection amendment, Dan Glickman would not have to leave the room, because he could reflect or pray in his own religious persuasion.

Let's turn to Congressman Kindness at this time.

STATEMENT OF HON. THOMAS N. KINDNESS, REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. KINDNESS. Thank you, Mr. Chairman, and distinguished members of the subcommittee.

I would like to first express a great deal of thanks for the opportunity to appear before you this morning to share in what light may be shed upon the general subject of school prayer.

This subject, I think, from the standpoint of one who serves on the other side of Capitol Hill, in the House of Representatives, has had insufficient examination and exposure. We have faced the situation in which no version of the school prayer issue has been reported by the Judiciary Committee over a period of years now, during which efforts have been extended to bring the matter to debate and vote on the House floor, and only by a discharge petition route can such a debate occur on that side of the Hill, in the other House. It appears that that is indeed the case again this year.

So, you are to be commended, Mr. Chairman, and members of the subcommittee, for opening this forum so that we may perhaps shed some light on the constitutional issue of freedom of expression in our public schools.

The timeliness of these hearings is obvious in light of the decision recently handed down in the U.S. Supreme Court in the case of *Wallace* v. *Jaffree*. I would submit, Mr. Chairman, that the handing down of that decision has created a greater focus for those of us who are concerned with the issue in a deep way, and it makes it clearer that the Court will indeed not modify its position, but in fact, the position of the Court has been extended by that Alabama case.

It is now perfectly clear that the Court majority is willing to infringe upon our first amendment right of freedom of speech, so long as those words are words of prayer and are extended in a public school.

I applaud your efforts with regard to the silent moment of meditation. That approach does not happen to be in keeping with my view that the first amendment right of free speech is too important to modify in the Constitution in that respect. But I do believe that we have a combination of issues that must be confronted; they are all encompassed within the first amendment. Freedom of assembly which assembly takes place in public schools and has as its purpose the expression of words of prayer is also reduced or infringed upon by decisions of the Court.

Nevertheless, Mr. Chairman, I most sincerely commend you and the subcommittee for delving into this subject again. Whatever may be done to remove the prohibition that exists by virtue of the construction of the Constitution by the courts ought to be done. While we may have differences as to the manner in which it ought to be done, I certainly believe that the issue must not be left merely to rest.

I will assure you that there will be efforts on the House side that will be most obvious and continuing and constant, to bring the other version, the President's proposed voluntary school amendment, to a point of debate and vote in the other body. But I look forward to following the series of debates which these hearings will generate. And I should point out that since the House Committee on the Judiciary will not be in any likelihood at all reporting anything, the focus is here, the focus of attention. I commend to your consideration the points that I have mentioned. I would be very happy to submit further material or argumentation, Mr. Chairman, without burdening this hearing.

Senator HATCH. Thank you so much, Congressman Kindness.

We will turn to you now, Congressman Barton, and look forward to your testimony.

STATEMENT OF HON. JOE BARTON, REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Senator.

I want to express my deep gratitude and thanks to you, Senator Hatch, and the other members of the committee, for holding these hearings on voluntary prayer. Given the importance of this issue and the stature of this committee, I am especially grateful for this opportunity to testify.

I also want to thank this committee for its consistent efforts on the issue. Those of us in the House of Representatives who favor school prayer are pleased that this committee reported the school prayer measure to the Senate last year, and we are grateful that you are working hard to do the same this year.

The recent Supreme Court decision which struck down the Alabama law that allowed silent meditation or prayer has focused the issue sharply in the public eye. This decision was not a death blow to our efforts, but in fact, has served to reinvigorate our cause. The dissenting opinions in the case, and even the concurring opinion of one Justice, show that the issue of prayer in school is far from settled. Throughout America, people are urging firm congressional action to restore the right of students to pray voluntarily in school.

We want you to know that there is a new movement in favor of school prayer in the House. We request that you send us a measure that allows voluntary vocal prayer. A number of us in the House are working together to promote this issue. We have formed a working group of House Members who are dedicated to this issue. This group is working with outside groups to generate mail and develop support. My distinguished colleague, Congressman Tom Kindness of Ohio, has also just testified before this committee. Congressman Kindness has introduced a bill that proposes a constitutional

amendment that would allow voluntary vocal prayer in the public schools.

We are also pursuing other legislative efforts to promote this cause. Amendments will be introduced in committees and on the House floor that forbid the expenditure of Federal funds for efforts to hinder voluntary school prayer. An amendment of this kind to the Justice Department authorization bill was defeated by the close margin of 18 to 16 in the House Judiciary Committee. This vote gives us confidence that we will obtain a record vote on whether or not to allow voluntary vocal prayer in our Nation's public schools.

As the committee knows, Congressman Kindness' measure is supported by the President, and President Reagan is supported by the vast majority of the American people. Many of my colleagues from Texas, in both political parties, support school prayer.

Of great importance to me, the people of my district strongly support vocal voluntary prayer in their public schools. My district, Texas' sixth, stretches from Dallas to Houston, and includes part of the city of Fort Worth. It is a diverse district of old cattle ranches and small towns and new industries and suburbs. It combines the hustle of the Sun Belt with the traditions of the Bible Belt. In 1984, a poll revealed overwhelming support for voluntary prayer. This past spring, I sent out a questionnaire to my entire district and asked them this question: "Do you favor enactment of a constitutional amendment allowing vocal voluntary prayer in school?"

Mr. Chairman, the people of Texas do not take lightly the prospect of amending our Constitution, but 68 percent of those who responded answered "Yes."

Recently, I was able to get away from the hustle of Congress and the committees and trips to the District and visit briefly the Jefferson Memorial. The weather there was nice, and there were many visitors from all across America. I listened to the hushed expressions of wonder at the beauty and spirit of the place, and the reverent explanations by parents to children of the meaning of Jefferson and his words.

I know that Mr. Jefferson's exact religious beliefs are the subject of some dispute and long discussion among scholars and political advocates, and I am not here to end that dispute today. But his words and thoughts are on clear public display, on his national monument:

> Almighty God hath created the mind free. All attempts to influence it by temporal punishments and burdens are a departure from the plan of the holy author of our religions. God, who gave us liberty, gave us life, gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God?

Mr. Chairman, in the spirit of liberty proclaimed by Thomas Jefferson, let the U. S. Congress take steps to restore the right of children to pray in school.

I thank the committee for this opportunity to testify.

Senator HATCH. Thank you, Congressman Barton.

We appreciate the leadership of both of you in the House, and particularly you, Congressman Kindness. You have been a bulwark over on the Judiciary Committee in so many ways over there, and very seldom can we get any of these issues up in the Judiciary

Committee in the House, and it must be kind of a lonely vigil from time to time.

Mr. KINDNESS. We have a lot of fun, Mr. Chairman.

Senator HATCH. I think you do. [Laughter.]

I want to thank both of you for taking time to be with us today. Thank you for coming.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. BARTON. Thank you.

Senator HATCH. We will at this time call on our panel.

Our first witness will be Prof. Michael Malbin, who is resident fellow at the American Enterprise Institute, and one of the outstanding scholars on the history and development of the establishment clause of the U.S. Constitution. In particular, he is the author of two outstanding monographs, "Religion and Politics: The Intentions of the Authors of the First Amendment," and "Religion, Liberty and Law and the American Founding."

Our second witness will be Prof. Norman Redlich, a man I admire a great deal, who is professor and dean of the Law School at the New York University and a distinguished scholar on constitutional law. We welcome you here, Professor Redlich, as well.

Our third witness will be Tom Parker, who is a partner in the Alabama law firm of Parker & Kotouc. He was the lead attorney for the State of Alabama in this month's Supreme Court decision on school prayer, *Wallace* v. *Jaffree*.

And our final witness will be Dean Kelley, who is the director of Religious and Civil Liberties of The National Council of the Churches of Christ in the U.S.A., here in Washington, DC.

We feel as though you four can represent the two sides of this debate as well as any four people on Earth, so we are delighted to have you here, we are delighted to listen to you, and of course, we will have some questions for you when we complete all of your testimony.

Dr. Malbin, we will begin with you. We would like to have you summarize, if you can. We have read your statements, and some of them are quite lengthy. We will put every statement in the record as though fully delivered. The summaries will be important, and we would like you to limit yourselves to 10 minutes, if you can, and then we would like to have some questions, because we have a number of members of the committee who have questions on this issue.

Professor Malbin.

STATEMENT OF A PANEL, INCLUDING: DR. MICHAEL MALBIN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, DC; DEAN NORMAN REDLICH, COLLEGE OF LAW, NEW YORK UNIVERSITY, NEW YORK, NY; THOMAS F. PARKER IV, ATTORNEY, PARKER & KOTOUC, P.C., MONTGOMERY, AL; AND REVEREND DEAN M. KELLEY, DIRECTOR OF RELIGIOUS AND CIVIL LIBERTY, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., WASHINGTON, DC

Dr. MALBIN. Thank you, Mr. Chairman and members of the subcommittee, for asking me back again.

For the record, I will be giving my own opinions, based on my research. I am not here representing the American Enterprise Institute as an organization. AEI takes no positions as an organization on matters of public policy.

As you know, I did testify here 2 years ago, and you have mentioned that. At that time, I noted that, based on my historical research: One, I thought a silent prayer or reflection amendment would be consistent with the original purpose of the first amendment's establishment clause; and, two, I said that the original intentions were not consistent either with the Supreme Court's current rule of law or with the vocal prayer amendment. Nothing has happened to change my opinion. For the sake of simplicity, therefore, I would request that you simply insert my 1983 subcommittee and full committee testimony into the record.

Senator HATCH. Without objection, we will place it in the record.

Dr. MALBIN. Two years ago, Senator, one of the main arguments people used against a silent prayer or reflection amendment was that the exercise was silly. The Supreme Court would never rule against silent prayer, the opponents said. Well, guess what? The Supreme Court just ruled. Well, ruled what? I am not at all sure what, beyond the narrow holdings of *Jaffree*. The Court struck down a law that used the word "prayer" in a silent prayer or meditation statute. A majority of the Court also seemed to say that some moment of silence statutes might pass constitutional muster, but there was no majority indicating what kind. Some of the opinions suggested that a statute using the word "prayer" might be acceptable if adopted under different legislative circumstances. On the other hand, a statute that did not use the word "prayer" might still be considered unconstitutional, depending upon the legislative history. All we really know from this opinion is that a majority of the Court is willing to promise us years of litigation, while they busily examine every State law, city ordinance, and local board of education ruling, presumably to reach different conclusions for identically worded provisions or statutes depending upon the speeches that staff members insert into the legislative record after debate is closed.

Let me get beyond the *Jaffree* case, therefore, to the underlying issue. The argument against having a silent prayer or reflection statute or amendment begins from the observation that such a statute would encourage religion. Well, I agree with that. A moment of silence probably does encourage religion more than not having a moment of silence. If teachers can go further as they introduce the moment of silence and say that students are free to use the moment to reflect or pray silently, well, that probably would encourage religion more than a moment of silence without an introduction.

Does this mean that a moment of silent prayer or reflection violates the Supreme Court's neutrality doctrine? I do not know. That depends on how judges apply the neutrality test.

Let's assume a hypothetical statute that offers students a menu of choices, without favoring or preferring any of them. The terms of the statute itself, by hypothesis, would neither encourage nor discourage religion. Religious and nonreligious thoughts would be equal. On these grounds, the statute would pass the neutrality test.

Well, we just said that having a statute encourages religion more than not having a statute. If the statute is measured against doing nothing, therefore, it would fail the test, even if the statute on its own terms would pass.

You can begin to see why the Court got itself involved with making case-by-case judgments. The neutrality test does not get you anywhere in these kinds of cases. The conclusion would depend not so much upon particular legislative histories as upon the question or measuring rod that an individual judge is using. This is a formula for rule by discretion, not rule by law.

So far, I have questioned the way the court applies the neutrality test in a particular situation. I turn now to the neutrality test itself. I do not want to use your time, as I have already said, to repeat the historical conclusions that I have summarized in previous appearances. Suffice it to say that Congress had no intention in 1789 of prohibiting a law that happened to aid religion or preferred religion over nonreligion, as long as the law did two things—as long as it did not discriminate among religions and as long as it satisfied the very significant test of having been passed in pursuit of a power that was legitimate and that was delegated to Congress under article I.

For example, the Northwest Ordinance reenacted by the First Congress gave land to churches to build schools. The land was available to anyone who wanted it, but the provision clearly did help churches. There were no public schools at the time. What made the ordinance legitimate was: (a) that it was passed in pursuit of Congress' authority to administer the territories; and (b) that it did not discriminate among potential school builders.

What happens if we use the historic nondiscrimination test to judge the vocal and silent prayer amendments that have been introduced to the Senate? There would be no question about the validity of silent prayer in my opinion. Silence does not discriminate in favor of or against anybody. Nobody can possibly be harmed. No imprimatur is given by the State. All the State is saying when it provides a moment of silence or prayer or reflection, as long as that phrase "or reflection" is used, is that its official policy is to create conditions under which people who want a moment to themselves may have it. By letting the word "prayer" appear in a statute, the State is saying that it respects and encourages religion and religious opinion. But the State is not saying that an opinion needs to be religious to be respectable.

If I may, I would like to say a word about vocal prayer. It is not the major focus today, but as we have just heard from previous witnesses, it has been reintroduced, and some people will try to move it forward.

My own view is that unlike the situation with a moment of silence, there is no conceivable way—none—for a State to encourage vocal prayers in a public school without discriminating against somebody. No prayer can be meaningful to some religions without being offensive to other religions, even if we set atheists aside for the moment.

The first amendment was meant to encourage religious diversity, and it did. This country is far more diverse than the United States of 1789. The Book of Mormon was not written until 40 years after

the amendment; heavy Catholic immigration did not begin for another decade or so; the large wave of Jewish migration from Eastern Europe began at the end of the 19th century. It was not until this century that we began seeing large numbers of adherents to the major Eastern religions. Meanwhile, many of the protestant sects that were here from the outset have come to disagree at an accelerating rate during this century over God's personal role in the events of this world. These differences in turn imply different theological interpretations of the meaning, efficacy, and content of prayer. Does God listen to prayer? Does God intervene? These points are controversial among theologians.

Under these conditions, I would defy anyone to find a prayer that could satisfy everybody who calls himself "religious"—again, forgetting the nonreligious for the sake of analysis and argument. Even a simple prayer, thanking God for the food we eat, is a statement that invokes a being whose attributes are not at all consistent with the supreme power accepted by Americans who happen to be Buddhists, Hindus, or even many contemporary Unitarians. It is simply absurd to imagine that there might be such a thing today as a consensus vocal prayer.

What about the well-meaning people who recognize that any prayer will offend some people, but believe that the majority must have rights, too? Well, the majority do have rights, but those rights do not include the right to have the State give official sanction to one form of prayer over others. To say that the minority may leave the room or remain silent while others pray does not negate the State's sanctioning of one sectarian belief over others.

For these reasons, I believe without reservation that a national vocal prayer amendment, no matter how qualified, would be dangerous, far worse than the status quo after *Jaffree,* and I say this despite all the criticisms that you know I have made of all the Court's rules of law since *Everson.*

The majority's right to pray could just as well be encouraged by a silent prayer or reflection amendment as by a vocal one. In a moment of silence, one is encouraged to speak internally in one's own religious voice and not to engage in watered down empty phrasemaking. Silence protects and encourages prayer. What silence hurts is the ability to persuade or proselytize, or give public witness to one's faith. None of these are appropriate activities for the State under our form of government.

Our political community is based on principles that respect and honor the importance of religion. But to say that our political community presupposes a friendliness to religion does not make us a religious community. The distinction between friendliness and being a religious community is subtle, but crucial. It is the kind of distinction that has always let Americans, from yesterday's Pilgrims to today's Iranians, to flee their home countries while their former compatriots fought civil wars to save each other's souls. Great countries sometimes depend upon great but subtle principles. Some people who have been angry at the Supreme Court have let their anger cloud the subtlety of their judgment. Anger may be justified, but unsubtle reactions are not--too much depends on it.

Senator HATCH. Thank you, Professor Malbin.

[Statement follows:]

STATEMENT OF MICHAEL J. MALBIN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. MALBIN. Mr. Chairman, thank you.

As you have indicated, I am a political scientist at the American Enterprise Institute for Public Policy Research where I am a resident fellow.

I appreciate your asking me to testify here today on what the members of the First Congress intended the establishment clause to mean and the implications of that meaning for contemporary concerns about school prayer and other issues.

What I have to say will be my own opinions, based on my own published investigation of the historical record. As you know, AEI takes no organizational positions on matters of public policy, and on this subject as on many others, there is a wide diversity of opinion at the institute.

Mr. Chairman and Senator Grassley, I know your time is limited. I will summarize my historical research briefly, and to support what I say, I request the two items you mentioned be inserted in the record or submitted for the record, as well as a chapter called "Religion and the Founding Principle," from Walter Berns' book, "The First Amendment and the Future of American Democracy."

Senator HATCH. Without objection, they will be inserted into the record after your oral statement.

ORIGINAL INTENTIONS

Mr. MALBIN. The Supreme Court has held since 1947 that the first amendment's establishment clause applies to the States as well as Congress, and that it prohibits both State and Federal law from giving direct or indirect assistance to religion.

The law, according to the court, must be strictly neutral between religious and secular institutions and activities. The Supreme Court asserted in Everson, Engel, and Schempp that its neutrality test was based on the intentions of the authors of the first amendment.

As evidence, it drew upon a phrase, "wall of separation," from a private letter written by Thomas Jefferson in 1802, and some statements Jefferson and Madison made in support of the 1784 Virginia Bill for Establishing Religious Freedom. But Jefferson was not even a member of the First Congress. Madison was the floor manager for the amendments, to be sure, but one should not interpret the result of a collective deliberation solely from statements made by a floor manager in an entirely different setting 5 years before, particularly not when we have better records available in the "Annals of Congress."

The debates over the Bill of Rights in the "Annals" are less complete than we might wish, but there was more discussion of the establishment clause than of most of the other proposed amendments. Although the debate left many questions unsettled, it was clear on some key points.

Madison thought the Bill of Rights was not necessary given his views on enumerated powers and his views on the necessary and proper clause. The best protection, he thought, against a national religious establishment, or against all forms of majority tyranny, was an extended republic that was friendly to and fostered a multiplicity of sects, opinions, and interests.

Nevertheless, to respond to concerns raised during ratification, he agreed to sponsor a set of amendments in the First Congress. One of them read, "No religion shall be established by law." It was interpreted by Madison to mean, "that Congress should not establish a religion." Please note that Madison said Congress should not establish a religion, not that Congress should not establish religion as such.

But Madison's interpretation did not match his own original language. This led members of Congress to express two different kinds of concerns. One, to quote Benjamin Huntington, was "that the words might be taken with such latitude as to be extremely hurtful to the cause of religion."

The other was that the amendment might permit Congress to pass laws that would threaten religious establishments in the States. Various formulas were offered to deal with both issues. Some would have limited the amendment to the establishment of articles of faith, but that did not satisfy members who were concerned about other less discriminatory issues.

Another formula—and this one was adopted temporarily— would have prohibited any law touching religion. That formula would satisfy today's most extreme separationists at the national level, but it also would have barred any law that even indirectly affected establishments in the States.

The final language compromised both issues: Laws touching religion were allowed, but not ones directly "respecting an establishment of religion" in the States. At the same time, the language prohibited Federal laws that favored one religion or group of religions over others. Again, note the phrase, "respecting an establishment of religion," rather than "the establishment of religion."

But the language did not prohibit laws that might tend to assist religion as such. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress re-enacted in 1789. One key clause in the ordinance read as follows: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of learning should forever be encouraged."

This clause clearly implied that schools, which were to be built on Federal lands with Federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run, sectarian schools. However, the aid was open to any sect that applied.

In summarizing the history, I should like to emphasize the broad area of agreement between Madison and others in the First Congress; they all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect and thus help avoid the religious divisiveness and religious warefare with which they were all so familiar from recent English history. We should not lose sight of the importance of this concern about divisiveness to the framers as we seek to correct recent misinterpretations of their intent.

At the same time as they were concerned about divisiveness, however, most members of the First Congress also thought religion was useful, perhaps even necessary for teaching morality. Most also thought a free republic needed citizens who had a moral education. They thus tended to view nondiscriminatory aid to religion not as a policy designed to achieve religious objectives, but as one, to use the current language, "with a secular purpose and effect."

CONTEMPORARY IMPLICATION

What does this all mean for contemporary deliberation? Obviously, the intentions of the framers cannot be binding upon you. The amending power specifically grants you the authority to make your own determinations.

On the other hand, I personally believe the framers' intentions offer more than historical guidance. I believe their principles were wise and remain so today.

In applying the framers' view of establishment, we first have to decide how to handle the federalism issue. The establishment clause, we saw, prohibited Congress making laws to help or hurt the State religious establishments. The *Everson* case of 1947 said the 14th amendment applied the establishment clause to the States. This created a logical absurdity. Applying the original intention to the States would mean that no State could make any law to help or hurt a State religious establisment. Nor can one get out of this logical absurdity by saying that the 14th amendment changed the situation. If the authors of the 14th amendment had thought this, Blaine would not have offered his own famous amend-

ment, which passed the House and failed in the Senate in 1876 and read as follows: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." This amendment clearly would have been redundant if the original supporters of the 14th amendment, Blaine included, had thought of it as "incorporating" the establishment clause.

That having been said, I would not have the temerity here to suggest how you might address the federalism issue today. Its implications go well beyond establishment and would involve you in issues relating to the whole of the Bill of Rights.

But let us assume the federalization of the establishment clause for the sake of discussion, either because it is a judicial and political given, or because we accept it, as I do, as sound policy, if not good law. And I do not believe it is good law in issues relating to religious establishments.

Under this assumption, how do some contemporary issues measure up to the rest of what the framers intended in the establishment clause? Now, some issues are easy, in my opinion, despite some lower court rulings. Tuition tax credits and education vouchers would be allowed under any nondiscrimination test. Under the framers' test, they clearly do not discriminate among religions. Under the more modern test, they would not discriminate in favor of religion as such, as long as the amount of aid did not exceed Government spending for public school students.

Equal access is slightly more difficult, but only slightly. Providing equal access to school facilities for religious clubs after hours seems to raise no questions of discrimination, as long as the building remains open for other clubs anyway; allowing them during school hours might be more problematic, but that would depend on particular fact situations.

SCHOOL PRAYER

Prayer, I think, is much trickier than tax credits or vouchers or equal access. I think most people would agree today that requiring a student to say a prayer would be unacceptable, and no one is arguing that you should.

There is no such thing, in my opinion, as a nondiscriminatory prayer. Even a nondescript prayer thanking God for the food we eat invokes a being that is not at all consistent with the supreme powers accepted by those Americans who may be Buddhists or Hindus or members of one of the other large Eastern religions.

What about voluntary prayer? Here we have to be more precise than the President's proposed amendment about what is or is not voluntary. Is a prayer voluntary if students are told by their teacher that they may stand silently while their classmates recite words written by public officials, the situation in the *Engel* case? I think such a situation might be voluntary for adults but, contrary to what some have said here, I do not think it is the same thing for children. Yes, children may opt out, but only at the cost of asserting and maintaining their difference from their peers. This can be a high price to ask of children. It is not entirely free. And I believe it helps promote the tension and divisiveness the framers were trying to avoid.

Well, does it make any difference if we keep the above facts, but use a prayer that was not written by public officials, such as Bible readings or the Lord's Prayer, such as we had in the *Abington* v. *Schempp* and *Murray* v. *Curlett* cases.

Here, again, I believe the Supreme Court reached a decision that was consistent with the framers' intentions, even as it misstated the framers' intentions and implied what I believe to be a misguided rule of law. The situation is no more voluntary than the one in *Engel*, and in addition, prayers or readings from one religious source must in their nature discriminate among religions. They cannot help doing otherwise.

Well, what if a teacher just asks students to take turns leading the class in whatever the student may wish, another court case? That would change the discrimination's predictability. But it would increase the potential divisiveness. It would leave everything else the same. What if the teacher just said, "Let us pray" followed by silence? That would be less of a problem, but still a problem, even using the framers' test. The fact is that many religious people do not pray, as most of us think of prayer. Prayer, in my own religion, involves what Martin Buber called an "I-Thou" relationship. One prays to a divine being who cares. The idea of prayer, therefore, is very different from that of meditation, which is what one does in many eastern sects. Meditation among some Buddhists, for example, involves becoming something, not asking or thanking or praising.

MOMENT OF SILENCE

Finally, what if the teacher says just a little more and calls for a moment of silence for meditation or prayer or personal reflection? Here I can see no problem, and I can see a lot of benefit. Some lower courts, it is true, have held that though teachers may call for moments of silence for meditation or personal reflection, they may not mention prayer.

I find that perverse. The teacher in this situation is not recommending prayer, but suggesting it as one of several possibilities; yes, including prayer among the options may encourage more students to pray, but though the lower courts found this decisive, I think it is constitutionally irrelevant. It is perfectly neutral among religions. It is perfectly neutral between religion and irreligion.

Two lower courts have denied the latter by saying that including prayer serves to encourage religion. It does, but not at the expense

of anything else. It also serves, I may add, to encourage everything else that is mentioned in the same statement. The fundamental mistake here, moving back to the perspective of 1789, is that the framers thought they were serving secular purposes precisely by encouraging religion and religious diversity in nondiscriminatory ways.

TWO BASIC PRINCIPLES

The lower court decisions on silence expose a problem that I think lies at the heart of the current pressure for a school prayer amendment. The courts, particularly some lower courts, have proven themselves to be extremely insensitive in issues that relate to religion. People who think the courts have moved beyond neutrality to hostility do have some basis for their complaints. There is a grave danger, however, that reacting to insensitivity may produce some insensitivity of the opposite sort.

Let me give a personal example to explain what I mean.

I grew up in New York; for 2 years I was the only Jew in a class that was required to say the Regents' prayer that was overturned in *Engel*. I have no problem personally with that prayer. All it said—and by the way, this is all it said in the version we recited; it is slightly different from what you will find quoted in *Engel*—all it said was: "Almighty God, we acknowledge our dependence upon Thee, and we beseech Thy blessings upon us, our parents, our teachers, our country, and upon all mankind."

As I said, I had no problem with that, but most of my classmates did. No, they were not Buddhists or atheists; most were Lutherans or Catholics who thought the prayer was pabulum. So, many of them added something to give the prayer meaning. At the end, they would add, "In the name of the Father, the Son, and the Holy Ghost, Amen."

Now, I don't blame them for adding those words. After all, what is the purpose of a prayer that has no meaning for the person who is praying? But what was the real effect of that prayer in this situation? The majority were faced with an unpleasant choice. Add something to give the prayer meaning or stand there and be offended. What about the teacher? Well, by not disciplining the students who added something, the teacher, who I think also was faced with an impossible choice, permitted the prayer to reinforce the religion of the majority and thus permitted it to serve some of its legislative purpose. But she did so at the cost of promoting divisiveness and intolerance; that is, by heating up the very passions that the framers were trying to cool off by promoting religious diversity.

These passions were the very ones that produced religious warfare on a grand scale and school boy fistfights on a lesser one. And what for? Did this exercise really do anything more to reinforce the religious beliefs of the majority than would a moment of silence? I think not.

In conclusion, the framers wanted to encourage religion, both, one, because they thought religion was salutory, and thus served a secular purpose; and two, because they thought diversity and the requirement of nondiscrimination would promote civil peace. Both halves of this were equally crucial to them. And I urge you to keep them both in mind in your deliberations.

STATEMENT OF A PANEL, INCLUDING PROF. MICHAEL J. MALBIN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, DC, AND ADJUNCT ASSOCIATE PROFESSOR IN POLITICS, CATHOLIC UNIVERSITY, WASHINGTON, DC,

Professor MALBIN. Thank you, Mr. Chairman. I should like to start with this caveat: what I say will be based on my own research. I am not here to represent anyone, and AEI does not take any organizational positions on matters of policy.

Let me come right to the point, Mr. Chairman, and Senator, as you requested. You have two amendments before you, the President's and the silent prayer or meditation amendment. I believe the Supreme Court, since 1947, has adopted a rule of law that runs counter to the intentions of the first amendment by prohibiting nondiscriminatory public support for religion. Hence, I believe it is appropriate to amend the Constitution, but only to restore its original meaning. However, like Professor Cord, I believe the President's amendment to be contrary to the principles of 1789, because it would foster discriminatory sectarianism.

Therefore, I think of the silent prayer amendment not merely as a fallback compromise. Given the proper understanding, it is the best expression of the full range of concerns the framers had in mind almost 200 years ago and that we should have in mind today. The silent prayer amendment need not be weak-kneed, as some conservative critics have suggested. It allows public officials to make a clear, unequivocal statement on behalf of returning religion to an honored place in public life, and it allows for deep, meaningful prayers, not the watered-down pablum that comes from publicly written compromises. At the same time, and contrary to its separationist critics, the silent prayer amendment would not establish a religion or even establish religion as such. Students would be free to meditate on whatever they wish. Unlike the situation that must prevail with any vocalized prayer, no student would be pressured to accept or even listen to anything he or she found offensive.

Despite the attacks from both left and right, therefore, I believe that a silent prayer amendment and only a silent prayer amendment, can meet the serious and legitimate concerns—not all the concerns, but the serious and legitimate ones, of those who want prayer, without raising any of the serious and legitimate concerns of those who are on the other side.

Let me now go to a more detailed consideration of the issues. I shall do so in five parts, and as you suggested, I shall summarize them.

The first is on the intentions of 1789; the second is on separationist arguments against silent prayer; the third, on the President's amendment; the fourth, on conservative arguments against silent prayer, and the fifth on whether a silent prayer amendment is necessary or appropriate at this time.

The first part. Mr. Chairman, I know you have asked me to come here primarily because of my published work on this subject. I have already described that research in subcommittee, and I will

not take your time reviewing a lot of old ground. But I would like to summarize a few main points.

Speaking very broadly, most contemporary interpretations divide into two camps, both of which I think are wrong. Separationists, following the modern Supreme Court, like to say that the First Congress intended to erect an absolute "wall of separation" between church and state. They cite a private letter written by President Jefferson in 1802, some statements made by Madison in 1784 in Virginia and later while he was President. But Jefferson was not even a member of the First Congress. Madison was the floor manager of the amendments, it is true; but you know from your own experience that statements of a floor manager, made in a completely different context, several years removed, cannot be used as if they represent the result of a collective deliberation. Moreover, these statements do not even fairly represent Madison and Jefferson, as Professor Cord's work has shown.

On the other side, conservative critics like to point to the general public practices in the years just after 1789. They talk about the fact that we have had prayers for many years. If public prayers were generally accepted, they say, how can you read the framers as having intended to ban prayer? This point of view is valid—I concede that—but it does not go far enough. The framers' view may well have accepted some exercise which they did not see or understand as being inconsistent with their principles, but which proved to be inconsistent with the same principles in a religiously more diverse nation.

To resolve the difference, we have to look at the principles that the Members of the First Congress intended to convey, and we do so based on the Annals of Congress.

Madison's original proposal read, "No religion shall be established by law." He interpreted it in his own opening remarks to mean "that Congress should not establish a religion." Note that what he said is Congress should not establish "a" religion, not that Congress should not establish religion as such.

But Madison's interpretation did not match his own original language. That led Members of Congress to express two different concerns on behalf of religion. One, to quote Benjamin Huntington, was "that the words might be taken with such latitude as to be extremely hurtful to the cause of religion." The other was that the amendment did not prevent Congress from passing laws that would threaten the existing establishments in the States.

The final language compromised both issues in favor of religion. Laws touching religion were allowed, but not ones that would have directly curtailed establishments of religion. At the same time, the language prohibited Federal laws that directly favored one religion or group of religions in favor of others. Again, note the phrase, respecting "an" establishment, not "the" establishment.

But the language did not prohibit laws that might tend to assist religion as such. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787. The same First Congress reenacted the Ordinance in 1789 in the middle of their deliberations about the Bill of Rights. One clause in the ordinance said that schools were to be built on Federal lands with Federal assistance, so they could promote religion as well as

morality, and in fact, most schools at the time were church-run, sectarian schools. However, the aid was open to any sect that applied.

In summary, the Members of the First Congress wanted religion to flourish, but they wanted a secular government. They thought a multiplicity of sects would help prevent domination by any one sect, and so help to avoid the religious divisiveness and warfare that they knew, from recent English history. We really should not lose sight of the importance of their concern about divisiveness, as we seek to correct recent misinterpretations.

At the same time as they were concerned about divisiveness, however, most members of the First Congress also thought religion was useful, perhaps even necessary for teaching morality. Most also thought a free Republic needed citizens who had a moral education. They thus tended to view nondiscriminatory aid to religion, as long as it was truly nondiscriminatory, as a policy that was designed not to achieve religious objectives, but as one, to use the current language, "with a secular purpose and effect."

I turn now to the second point, current court doctrine and the separationist arguments against silent prayer. The Supreme Court since 1947 has consistently misstated the framers' intentions, even as they claimed to be relying on them. The Court in 1947 said that neither Congress nor a State may do anything to aid or prefer one religion over another, even in a nondiscriminatory way. The Court thus changed law in two ways, first, by prohibiting nondiscriminatory aid, and second, by applying a no-aid interpretation to the States when the original intention was in part to protect the existing State establishments.

On the Nation-State issue, by the way, if anyone wants to argue that the 14th amendment changed things, that person has to cope with the awkward fact of the Blaine amendment.

The current separationist critics of the silent prayer amendment rely on the Supreme Court "no-aid" and "neutrality" rules to say that a silent prayer or meditation amendment should be prohibited.

"Enforced classroom silence," said the New York Times, in a June 19 editorial, "is hardly less controversial than other prayer amendments that have been kicking around for years."

Nonsense. Vocalized prayer is necessarily and inherently discriminatory. Silent prayer is not. A call for silent prayer would clearly meet the framers' original intentions without requiring anyone to say anything, believe anything, or even listen to anything with which he or she did not agree.

But some say that is not the point. For example, the New Jersey Civil Liberties Union has filed suit against that State's silent prayer or meditation statute, and it says that the problem is that the law openly proclaims its intention that a period of time be set aside each day for prayer. Well, it does, but that is not the whole story. The legislative choice was between a statute that was limited to silent meditation and one that specifically included the word, "prayer."

Yes, adding the word, "prayer," does encourage religion more than leaving the word out. It also serves to encourage everything else that is mentioned in the statute. I find it strange that some of

the same groups that oppose–not all, but some of the same groups that oppose periods of silent prayer or meditation support kindergarten classes on nuclear war and junior high school classes on contraception. When challenged, these groups say they are not advocating unilateral disarmament or teenage sex. No student will be coerced or pressured, they say; they just want youngsters to make an informed choice. Well, precisely so. I do not oppose sex education. I believe in informed choice. Nothing more is involved in the silent prayer amendment.

Part three. I now turn to the President's amendment, which would permit vocal, group, voluntary prayer in the classroom. My problem is there is no such as a nondiscriminatory vocal prayer. Even a nondescript prayer thanking God for the food we eat invokes a being not at all consistent with the supreme powers accepted by those Americans who happen to be Buddhists, or Hindus, or members of one of the other large Eastern religions, or even many contemporary Unitarians.

The narrow holdings in *Engel* and *Abington*, therefore, in my view, were both correct. It is their broad rules of law and subsequent applications that cause difficulties.

What sort of prayer might be offered under the President's amendment? It seems to me there are only three possibilities: one written by the State, one chosen by the State from sectarian liturgy, or one offered voluntarily by a student. Each has a problem. A State-authorized prayer is bound to be pablum for some, while discriminating against others. Having the State choose a sectarian prayer or reading would increase its meaning for some, but also increase the discrimination against others. Having students take turns reading their own prayers would not change the discrimination. It would only change its source and predictability. But how could anyone be offended, it might be argued—and the Deputy Attorney General argued today—if participation is voluntary? What is offensive about vocal prayer or the use of visual religious symbols, artifacts, or gestures is not that they force minorities to participate, but that they inevitably stamp a discriminatory State imprimatur in favor of the religions that may be dominant in any local community.

On the other point, however, I do not believe the situation would be simply voluntary. It might be for adults, for example, when the chaplain reads before the Senate, but it is not for children.

Children may opt out, yes, or forcefully proclaim that they are different, but only at the cost of facing up to peer pressure and ridicule. The problem of peer pressure and ridicule, which has been belittled by some, in my opinion gets at the heart of what is wrong with the President's amendment. The purpose of the first amendment was to support an environment in which religion was honored, but in which the passions that produce civil strife were damped down. The President's amendment would honor religion, but it would also inflame the religious passions in every school district in the country by turning the content of prayer into a political football.

The dangers this might entail make me strongly prefer the status quo to vocal prayer if that were the only choice. It is not, however, as we have indicated.

I think at least part of the public senses the same danger that I am indicating. The supporters of the President's amendment like to cite polls that show 75 to 80 percent of the public favors a restoration of prayer in the public schools But when the questions are phrased more specifically to include words like "organized group prayers" or "organized vocal prayers," the support drops to the low to midsixties. Yes, that is still a majority, but it is not the kind of overwhelming consensus that is usually associated with an amendment, and I think the 10 to 15 percent who shift with the question's wording are trying to tell us something that is worth hearing.

Part Four. Some supporters of the President's amendment have opposed silent prayer because they believe vocal prayer would be more meaningful. I believe the reverse is true. Vocal prayer, as I said, must either be pablum or meaningful. If it is pablum, who needs it? If it is meaningful, some will be left out. To those who say there is no harm in being left out, and learning about someone else's religion, and taking a turn on another day, I say this confuses the purpose of having an amendment. The idea is to restore prayer, not to run classes in toleration or comparative religion. Comparative religion is permitted now. The aim should be, and I understand the aim of the amendment to be, to set time aside for prayer or meditation for every student every day, not to listen 4 days and pray 1.

Silent prayer is an important part of almost every religion. In my own Jewish religion, the lengthy Amidah, or silent prayer, comes in the middle of every service, at least three times a day. Similarly, many candidates with whom I have traveled stop several times a day, wherever they are, for silent devotion. These periods of silence are times set aside for intense personal communion with God. Their content, and their beauty makes the watered-down lip service of public recitation seem pale by comparison.

What about those students who do not know how to pray on their own, it may be asked? Well, I answer first that it is not the public schools' job to teach them. I would also say that students will have a chance for more meaningful religious leadership with silent than with vocal prayer. Every Sunday school could hold discussions on daily prayers for the coming week. There is no way the clergy could play anything approaching such a role with vocal prayer.

Finally, what about those who say, as some evangelicals have said to me, that they have a religious obligation to proclaim the name of Christ aloud, which silent prayer does not satisfy? To them, I say fine, but not in a classroom. Vocal and silent prayer in most faiths serve different religious purposes. Silent prayer is personal; it is for personal communion with God. Vocal prayer, on the other hand, is communal or group prayer. The public school is not a religious community, and it should not be. As a political community, we must be open to those who disagree on matters of faith; that is a bedrock principle of the constitutional regime.

Finally, what about whether the amendment is necessary? Some argue that it is not because the Supreme Court has never ruled on the issue.

I think the neutrality rule is and should be consistent with silent prayer or meditation. However, many lower courts disagree, and who knows what the Supreme Court might say, or if it would say anything at all?

The subcommittee amendment does not represent present law. The lower court rulings on silent prayer have not been as favorable as some previous witnesses have said. As Professor Dellinger said, adding the word "prayer" is the issue. The score now, if I am not mistaken, is one 17-year-decision in favor, and four against. The other decisions that are counted in favor usually involve silent meditation statutes that do not mention the word "prayer," and the against rulings are much more recent.

We also know that there are 18 States with silent prayer or meditation statutes, but very few school boards have implemented them. I cannot help but believe that this is partly because of the way the school boards themselves read the Court's doctrine, and partly because of the pressures being placed on them by local civil liberties organizations.

As long as this situation exists, people who want some kind of silent prayer or meditation exercise are being denied an opportunity that they should have. It is perfectly appropriate for this body to affirm a right whose exercise is being chilled in large part by the courts. At the same time, it is appropriate for this body to declare loudly that one can honor and reserve a place for religion without establishing a religion. Yes; you could wait for the unpredictable Supreme Court, but you might have to wait for a lifetime.

Senator HATCH. We will now turn to Dean Redlich and take your testimony.

STATEMENT OF NORMAN REDLICH

DEAN REDLICH. Thank you, Senator Hatch, and members of the subcommittee.

I, too, am honored to be present at this important hearing. I am dean and professor of law at New York University School of Law, where I have taught constitutional law for 27 years.

I appear before you, however, not only as a constitutional scholar, but as someone who is deeply committed to certain religious views, and I hold my views with regard to separation of Church and State out of a deeply felt belief that that separation is essential to preserve the religious freedom, the religious diversity, and the religious harmony that have blessed this land and for which my forebears came here.

It has been said this morning that a moment of silence, or a moment of silence and prayer, or prayer, cannot hurt anyone. Let me read to you an excerpt from a recent lower court opinion in which a child described his experience in a State where there was a statute which provided for a moment of silence, for contemplation, meditation, or prayer.

Quote: "Well, in the second period, which was Science, people who was in my home room turned around and asked me why I had been reading a book during the moment of silence. And I told him that I didn't have to pray then, and I didn't want to. And then he told me that I should be praying all the time. And then he said something to the effect that if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the

second time, instead of, as he put it, going down with all the other Jews."

The essence is that as Senator Simon has said, the only way that we can achieve neutrality in religion is for the Government to keep its hands off of religion. I will respect, Senator Hatch, your introductory comments that we confine ourselves to the silent prayer amendment. My written statement makes reference to both the vocal prayer and the silent prayer amendment, but my summary this morning will confine itself to the subject matter of the hearing which you have set forth.

At the outset, it should be clear that, contrary to the claims of so many people, there is absolutely nothing in any Supreme Court decision, nothing in the first amendment, nothing in *Engel* v. *Vitale,* or *Wallace* v. *Jaffree,* to stop children from praying. Children have a free exercise right to engage in individual prayer, and it has been said that as long as there are math tests, children will pray.

There is nothing to stop children from saying grace over meals. The issue is the simple one of whether Government in one form or another can endorse religion. A pure moment of silence, if it is really designed for meditation, is perfectly permissible under the Constitution and under Supreme Court decisions. In such a moment of silence, individual children are free to pray. That is a very different thing from the Government endorsing the practice of prayer. The amendment which is before us this morning is clearly intended to promote religion. It is clearly intended to encourage prayer. That will be its impact, and that in my judgment is its essential failing. And I say this not out of a hostility to religion, but out of a profound devotion to religion.

I consider myself a religious Jew, and I know from the tormented history of many minority faiths that the best security for all religion is Government neutrality in all matters of religious faith, including what appears to be the innocuous practice of a moment of silence or prayer.

The very debate over prayer, the very debate over a moment of silence over prayer, like the debate that tore apart Virginia in 1784 and 1785 over an innocuous tax, disturbs the peace and harmony of this country.

I do not want my children and grandchildren—I must say, I am of the age now where it has to be grandchildren——

Senator HATCH. Join the crowd; I've got three.

Dean REDLICH [continuing]. My grandchildren to experience the experience of that child. I do not want them to be strangers in their own home. There are no minority religions in this country There are no majority religions. We all equally share the constitutional turf. And no child should feel embarrassed, no child should feel pressured, and this great body, the U.S. Congress, should not be sending a message of endorsement with regard to religion.

Failing to send that message does not mean that you are hostile to religions. It means that you are supportive of a constitutional principle which has assured more religious freedom, more religious diversity, and more religious harmony in this country than any other nation in the history of the world.

Now, why are we prepared to cut our country through this turmoil once again, to have still another debate on the question of pro-

moting religion? Will this constitutional amendment really promote religion?

How many religious leaders would really believe that a legislatively mandated moment of silence or prayer is going to promote religious values to any significant extent in this country? Will this constitutional amendment promote meditation? Will it promote truly voluntary prayer? Will it promote educational values? It will not. Freedom of religion flourishes in this country as it has flourished nowhere else. People still seek it out as a haven of religious freedom, and they do so because we have succeeded here where no other country has succeeded, and we have done so because we have been faithful to a constitutional principle that was put here for that purpose.

I ask the supporters of this amendment why can't they agree with what Supreme Court Justice Jackson—a profoundly religious man—said. He had sent his children to religious schools, and he said that, "What should be rendered to God does not need to be decided and collected by Caesar."

The Bill of Rights still lights up the skies for all the world to see. We should not tamper with it for the sake of this amendment, which does not promote religion—it should not promote religion; it does not promote meditation; it does not promote education. Why are we unloosing this mischief at work in our land?

In essence, this country is never going to find God by losing its soul.

Senator HATCH. Thank you, Dean Redlich.

[Statement follows:]

PREPARED STATEMENT OF NORMAN REDLICH

My name is Norman Redlich. I am Dean and Judge Edward Weinfeld Professor of Law at the New York University School of Law where I have taught constitutional law for twenty-seven years. I have been a member of the New York City Board of Education, and was Corporation Counsel of the City of New York from 1972 to 1974. I am the co-author of a constitutional law casebook. From 1979 to 1981 I was co-Chair of the Lawyers' Committee for Civil Rights Under Law.

Presently, I serve as co-Chair of the Commission on Law and Social Action of the American Jewish Congress* and am a member of the Board of Overseers of the Jewish Theological Seminary. I also served on that Seminary's special commission to study the question of the ordination of women in the Conservative Rabbinate.

I mention the latter affiliations because, while I appear here as a student of constitutional law, and in that capacity oppose the enactment of S.J.R. 2 and 3, my views on the subject are motivated in large part by a firm religious commitment. I consider myself a civil libertarian, and have been active in civil liberties and civil rights causes for many years. My opposition to this amendment, however, stems not only from my concern for civil liberties, but my abiding concern for the survival of religious freedom as we have known it in this country.

This Committee is considering two different amendments. S.J.R.2, introduced by Senators Hatch and De Concini, provides:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

S.J.R. 3, introduced by Senator Thurmond, provides:

> Nothing in this Constitution shall be construed to prohibit individudal or group prayer in public schools

* The American Jewish Congress joins in these comments.

or other public institutions. No person shall be required by the United States or by an State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

I.

By definition, a constitutional amendment is a change in the rules of the game. When Congress considers ordinary legislation, and a constitutional lawyer is asked for his or her opinions about its constitutionality, the answer will focus on judicial decisions and their application to the proposal at hand. But when a student of the Constitution is asked to comment on a proposed constitutional amendment, he or she has a different task: to define what the law is now, and to identify how the proposed constitutional amendment would work on change in the law.

One additional task falls to the student of the Constitution called upon to express a view on a proposed constitutional amendment: to identify those principles embodied in the relevant portions of the Constitution as it exists, and to express a view on how the proposal would alter those principles. The first set of tasks calls for a relatively narrow legalistic focus; the latter for a broader, long range, almost philosphical, perspective.

To put the matter in the terms of the amendments we are discussing today: The first task requires me to discuss whether the Supreme Court's decision in Wallace v. Jaffree would permit the courts to uphold a statute calling for a moment of silence, or a moment of silence for prayer, reflection or meditation when the record does not demonstrate a legislative intent to further religion. The second requires me to focus on whether the proposed change in the Constitution would substantially alter the existing relationships between government and religion across a broad spectrum of issues, not only prayer in the public schools.

My comments today will address both of these issues. In addition, I include in the course of my remarks some general comments about the wisdom of the Amendments before the Subcommittee, for ultimately this Committee is charged with determining a question of policy, not law.

II.

Almost twenty years ago, Professor Paul Kauper (who, in addition to being a fine Constitutional lawyer, was a devout Christian) appeared before this Subcommittee to testify against an earlier proposal to amend the Constitution to overturn the Supreme Court's landmark decision in Engel v. Vitale, 370 U.S. 421 (1962) and School District of Abington Township, 374 U.S. 203 (1963), banning school sponsored prayers in the public schools. In his testimony, Professor Kauper laid out a standard for evaluating constitutional amendments which I believe should guide this Committee:

> Any proposal to amend the Constitution should... be subject to very careful scrutiny. My thinking about the constitutional amendment process is that any proposed amendment should deal with fundamental matters of constitutional concern and that the necessity and desirability of the amendment should be clearly demonstrated.

Kauper, Statement Relating to School Prayer, Hearings on S.J.Res. 148 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 601, 605 (1966). This is a sound standard, and one which finds justification in the constitutional text in the ways in which the Founding Fathers made it difficult to amend the Constitution.

The Constitution has been amended only 16 times after the adoption of the Bill of Rights. Only four of those sixteen amendments were adopted to overrule a specific decision of the Supreme Court. The Bill of Rights itself has never been amended, either to overrule the Supreme Court or otherwise. That is, no doubt, because the Bill of Rights occupies a special niche in American political life.

Congress has always recognized that amending the Constitution is a matter of the gravest moment. It has always acted with restraint in this area, not invoking the Amendment process to challenge every questionable constitutional ruling. That political restraint has served the nation well, lending our political system - and our rights - a stability and permanence which are widely envied.

Neither S.J.R.2 or S.J.R.3 meets Professor Kauper's standard of strict necessity and desirability.

III.

S.J.R.3 is similar to numerous other proposals Congress has considered over the years to permit vocal school prayer, but never adopted. It is, of course, "necessary" if there is to be vocal prayer in the schools, but it is not desirable. S.J.R. 3 is almost identical to S.J.R. 199 (97th Cong. 2d Sess.) about which I testified at length several years ago. Nothing that has happened since that time has led me to reconsider what I wrote then:

> The proposal you have before you does not deal with a fringe interpretation of the Establishment Clause. It deals not with questions of remedial reading taught to parochial school students, nor to the issue whether the singing of Christmas carols is or is not a religious exercise. It does not concern textbooks or mathematics courses taught in religious schools. Nor does it even purport to establish a religious exercise which is non-denominational, perhaps because sponsors of the school prayer amendment realize that there is no such thing as a non-denominational prayer. No, this proposed amendment does not deal with peripheral questions under the Establishment Clause. This proposed amendment strikes at the very core of constitutional values that underlie our most precious guarantee of religious and political freedom. This amendment permits an avowedly religious exercise - a prayer - of whatever nature may be approved by the majority of any school district in the country. Whether it be Mormon prayers in Utah, Jewish prayers in Brooklyn, Catholic prayers in Boston, Baptist prayers in Georgia, Congregationalist prayers in parts of New England, religious prayers are to be permitted by this proposed amendment, subject only to the limitations that a person shall not be required to participate in prayer.
>
> Scholars may disagree over the motivation of the Founders in prohibiting religious establishments. I happen to believe that the Supreme Court's interpretation of that history is correct. But even those who may disagree with the Court's view that all aid to religion is prohibited concede that government is not permitted to discriminate among religious sects. Even Justice Stewart, the sole dissenter in Schempp, agreed that school officials could not favor one religion over another. Most Americans conceive it as settled doctrine that religion is a private affair and that government may not favor one faith or the other. In my view, then, this proposal is not a conservative one, but rather a profoundly radical alteration of a basic precept of American life, the required neutrality of government among religious faiths. It will undo one of the proudest achievements of this republic.
>
> It is too often assumed that the free exercise clause is the prime guarantee of religious liberty, that the Establishment Clause is, somehow, hostile to religion, designed to keep religion from becoming too powerful. This represents a profound misreading of history and a lack of appreciation of the Establishment Clause as itself a prime guarantor of religious liberty. There cannot be true religious liberty - the right of a person freely to choose those forms of religious belief and expression which represent that individual's innermost expression of

> faith - if the government is permitted to display favoritism to one faith or the other. It is our constitutional theory that the government, which represents all the people, has no business generating the pressure of any religious belief on any individual citizen. The First Amendment command that government make no law respecting an establishment of religion, which this proposed amendment would alter in a most fundamental sense, is an essential feature of a constitutional structure which guarantees that persons can conduct their religious practices, and express their religious beliefs, free from pressure of government conformity.

A constitutional amendment presupposes a societal consensus that a certain policy is so fundamental, so certain, so essential a principle as to merit inclusion in the community's fundamental charter. While unanimity is not the test, a proposal which has been debated by the Congress on at least five occasions over twenty years - as has vocal school prayer - and been rejected each time, surely cannot be said to embody a consensus of the political community.

Neither can it be said that a badly divided Supreme Court is clinging to dubious precedent, solely for history's sake, so that it might be argued that an Amendment was needed to break the constitutional logjam. While three justices dissented from the invalidation of the Alabama silent prayer statute, none voted to uphold Alabama's vocal prayer statute. Wallace v. Jaffree, 466 U.S.____ (1984) or Louisiana's voluntary vocal prayer scheme, Karen B. v. Treen, 653 F.2d 897 (11th Cir.), aff'd, 455 U.S. 913 (1981). Even Justice Rehnquist who expressed a minimalist view of the Establishment Clause, Wallace v. Jaffree, supra, 53 U.S.L.W. 4665, 4679, did not dissent from the conclusion that Alabama's vocal prayer statute was unconstitutional.

Scholars such as M. Malbin, Religion and Politics; The Intentions of the Authors of the First Amendment (Preface at 2), and R. Cord, Separation of Church and State; Historical Fact and Current Fiction, (p.165), who generally fault the Supreme Court handling of Establishment Clause cases, agree that Engel and Schempp were correctly decided. There is as close to a scholarly consensus as one comes in constitutional law that government sanctioned prayers in the public schools run counter to the relationship between church and state contemplated by the Founding Fathers.

Of course, the Constitution is not immutable. But where is the clamor to allow prayer in the schools? Not, surely, from educators, who oppose prayer in the schools. They do so not because the Constitution requires that result but because they have discovered that

prayer is disruptive and divisive in their schools. It is an educationally unsound practice.

While the religious community is divided, many, if not most, religious organizations oppose vocal school prayer. Only recently, the [illegible] Committee on Public Affairs, the National Counsel of Churches, the Presbyterian Church (U.S.A.) and the National Association of Evangelicals, noted their rejection of state supported efforts to sponsor or control religious services. In an amicus brief filed with the United States Supreme Court in Bender v. Williamsport Area School District they wrote: "Amici firmly oppose establishment of religion in schools by government mandating, sponsoring, initiating, promoting or organizing religious activity."

S.J.R. 3 has not become more desirable over the years. It is a proposal fundamentally and inescapably inconsistent with the well functioning constitutional scheme for protecting religious liberty. S.J.R. 3 would destroy that scheme. It should be rejected.

IV. S.J.R. 2

S.J.R. 2 is not, strictly speaking, a reaction to the Supreme Court's decision two weeks ago in Wallace v. Jaffree, since it was introduced before that case was decided. It is nevertheless that decision which is the most relevant authority on the constitutionality of "moments of silence" statutes.

Without here attempting a detailed analysis of the various opinions in Wallace v. Jaffree, let me point out certain salient points:

1) Many, if not nearly all, statutes calling just for a moment of silence, will be found constitutional. It is, however, unclear how the Court would treat a "pure" moment of silence statute when the legislative history unmistakably suggested a religious purpose;

2) Justices O'Connor and Powell's opinion are unclear as to whether a moment of silence statute could ever pass constitutional muster if it contains the word prayer. (In more formal terms, the question is whether the mere mention of prayer is a departure from the principle of official neutrality?

3) How does one assess the constitutionality of state moment of silence laws enacted years ago, where there is no equivalent in the Congressional record?

Based on the various opinions of the Court there is room for substantial disagreement over these questions, based on the various opinions of the Court. Some of these issues are already sub judice at the federal appellate level. In May v. Cooperman, 572 F.Supp.1561 (D.N.J. 1983), the Third Circuit will consider a "pure" moment of silence law but where the legislative history indicates a religious purpose. And in Walter v. W. Va. Bd. of Educ., ___F.Supp.___, (S.D.W. Va. 1985), app. pending (4th Cir. 1985) the Fourth Circuit will consider a moment of silence for prayer or meditation law adopted by popular referendum. These cases should be decided within the year, or far earlier than a constitutional amendment could be adopted.

If, then, the purpose of this proposal is to legitimize moments of silence as such, it fails Professor Kauper's test of strict necessity for, as noted, it is likely that many "moment of silence" laws - including many of those already on the books of the several states - are constitutional. At least as a matter of constitutional theory, other states may, if they wish, adopt such laws. There is thus, as yet, no need for a constitutional amendment to legitimize such statutes.

But even if the purpose is to legitimize moment of silence statutes which mention prayer as one of several permissible uses of the period, the proposal fails Professor Kauper's 'necessity' tests. It is not at all clear at this point that such statues are inevitably unconstitutional, at least if they have a legislative history somewhat less unusual (blatant) than that of the invalidated Alabama statute. Whatever I may think of the constitutionality or wisdom of such statues, it cannot be said that only a constitutional amendment could insure their constitutionality.

It certainly cannot be said that S.J.R.2 is necessary to preserve the right of students to pray on their own initiative. The Establishment Clause does not forbid such exercises; on the contrary the Free Exercise Clause protects them. Occasionally, over-zealous, but ill-informed, school officials interfere with such activities. Such action is based on a misinterpretation of the Supreme Court's decisions. Surely, though, that an occasional public official violates the Constitution is not a sufficent showing of necessity to justify a constitutional amendment.

Only if the purpose of S.J.R. 2 is to allow the states to explicitly

encourage students to engage in a religious exercise* -- to generate, in other words, a religious response during the moment of silence by students--is S.J.R.2 necessary. A statute which seeks such a religious purpose is unconstitutional under Jaffree. Although, this purpose meets the necessity test, it fails Professor Kauper's desirability test. It would make a radical departure from the constitutional policy which has given rise to a nation whose religiosity is unmatched anywhere else in the world.

At present, over half of the states have no moment of silence laws. If those states do not believe it necessary to encourage religion in this fashion, even though there is no clear restraint on their ability to do so, can it be said that encouraging religion in this fashion constitutes a "fundamental" constitutional policy which now must be made explicit in our most basic governmental charter?

V.

So much for the evaluation of S.J.R.2 as it would affect the public schools. What impact would adoption of S.J.R.2 have on church-state jurisprudence generally? How much would it reshape the current understanding of the First Amendment?

One can answer these questions only hesitantly. It is possible that the Court would view this amendment narrowly, as overruling one specific decision, and as having no impact on any other issue. However, I do not think this is very likely. The Court in Wallace v. Jaffree of necessity canvassed a broad range of Establishment Clause issues. Necessary to its holding were the following principles:

1) the Establishment Clause is binding on the states (53 U.S.L.W. at 4668)

2) that clause prohibits more than just the preference of one Christian sect over another (53 U.S.L.W. at 4669)

3) that the historical argument advanced by Justice Rehnquist, which is a radical departure from the Court's prior reading of that history was not adopted by a majority of the Court

4) religion may not be preferred over non-religion (53 U.S.L.W. at 4669)

5) the so-called three part test remains valid, and should not be altered (53 U.S.L.W. at 4670)

6) the purpose test means not only what the legislature intended to accomplish, but its reasons for acting. The inquiry here is essentially historical and hence factual (53 U.S.L.W. at 4690)

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* While S.J.R.2 prohibits a state from encouraging any particular form of prayer or requiring participation in prayer (how could a state do so?) it pointedly does not bar states from encouraging students to utilize the moment of silence for prayer.

7) the accommodation doctrine does not justify a majority using the machinery of state to encourage or require practice of its beliefs (53 U.S.L.W. at 4670 n.45)

As anyone familiar with the literature on the Establishment Clauses knows this list encompasses many of the most important issues raised in Establishment Clause jurisprudence. If S.J.R.2 is adopted, would not the courts reasonably conclude that these principles have been rejected by the people, the ultimate sovereigns in our democratic system? If I am correct in this analysis, this amendment, as modest as it appears, would have a monumental impact on the entire jurisprudence of the Establishment Clause.

The question which must be asked is whether whatever little impact the amendment would have on what happens in the public schools is sufficient to justify revamping church-state jurisprudence. The question takes on added urgency because religious groups have not rushed to support this proposal. The Jewish community is all but unanimous in its opposition to S.J.R.2. A broad spectrum of Protestant groups, including the National Council of Churches, also oppose it. The so-called Fundamentalist community is not enthusiastic about a silent prayer amendment. Indeed, many on the so-called religious right object to the amendment because they view silent prayer as too inconsequential to justify the effort of amending the constitution. Education groups, too, see no necessity for this proposal. Why then, and for whose benefit, open this Pandora's box?

VI Some Policy Questions

Adoption of a constitutional amendment would send a signal not only to the courts, but to school officials*, parents, religious leaders and the public at large, that the public schools are charged with insuring the spiritual and religious development of their students. It is true that S.J.R. 2 by its terms authorizes only silent prayers. It may be doubted whether that

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*The Courts which have considered the issue have found as a fact that legislated moments of silence serve no secular educational function, Duffy v. Las Cruces Public Schools Dist. 557 F.Supp.1013 (D.N.M. 1983).

restriction would be observed in practice. Morever, a realistic evaluation of this society is sufficient to indicate that the battle over prayer in the schools - silent or vocal - is symbolic of a larger battle between those who would increase the role of government in promoting religion and those who oppose such a role.

Adoption of S.J.R.2 would do more than permit silent prayer in the schools. It would reinforce the already unfortunate tendency towards government involvement in religious activity. Is. that wise? Is it desirable? Is is healthy for our society? Would it breed disrespect for law because many would take S.J.R.2 as a signal to ignore Engel and Schempp? Will it just whet the appetite of those who regard the separation of church and state as an idea born of the devil? Finally, is it fair to subject school children to silent prayer? Consider the following incident described by a student in Walter v. W. Va. Bd of Educ. _____ F.Supp _____, _____ (S.D.W. Va 1985) in which a moment of silence for contemplation, meditation or prayer statute was invalidated:

> . . . Well, basically they said, they told us how long it was supposed to be and quite a few minutes they kept saying, 'contemplation, meditation, and prayer' and then towards the end they told us that if we had any religious questions, we would be referred to our parents or to, I think the phrase was 'a leader of our faith,' but I am not exactly sure about the phrasing. . . Well, in second period, which was science, our teacher left the room to go find something and one of the people who was in my home turned around and asked me why I had been reading a book during the moment of silence. And, I told him that I didn't have to pray then and I didn't want to and then he told me that I should be praying all the time and then he said something to the effect that if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews.

Judicial review does not fit neatly with democracy. The jurisprudence literature, of course, deals with this problem at length. Whatever the theory, judicial review, as the federal courts practices it, has not destoryed democracy. On the contrary, in this country, at least, it has strengthed it. We are all freer bacause we do not let transiet majorities intrude into the freedom of conscience. As Justice Jackson wrote in another case arising in West Virginia:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversary, to place them beyond the reach of majorities and officials and to establish them as legal

> principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

West Va. Bd. of Educ. v. Barnett, 319 U.S. 624, 639 (1943)

Conclusion

The peculiar genius of the American constitutional system is that it balances majority rule against individual liberties. No where is that balance clearer than in the Bill of Rights. The Congress has until now respected that balance by refusing to amend the Bill of Rights, despite periodic popular criticm of judicial decisions. In the case of school prayer I believe that criticism unfounded and short sighted. But even for those who disagree, the wisdom of leaving the Bill of Rights unamended is or should be clear. I urge rejection of S.J.R.2 and S.J.R.3.

Senator HATCH. Senator Denton has just come in. Senator Denton will introduce Mr. Thomas Parker.

OPENING STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Mr. Chairman, I have a twofold purpose in attending today's hearing. First, to introduce to the subcommittee an outstanding young Alabamian, who lent his considerable talents to the many parents, teachers, and students who supported Alabama's voluntary silent prayer statute; and second, as you know, Mr. Chairman, I would want to associate myself with the admirable work that you are performing in holding this hearing.

The Alabamian is Mr. Thomas F. Parker IV. Mr. Parker represented 624 parents, teachers, and students in the companion cases of *Wallace* v. *Jaffree* and *Smith* v. *Jaffree*. His work was instrumental in ensuring that the voices of the majority of Alabamians were heard in the district appeals and supreme courts.

Tom brings to the subcommittee a viewpoint that I believe is shared by a majority of all Americans. Moreover, he possesses the academic and professional background to assist the subcommittee in its consideration of constitutional amendments that would rectify the precedent established by the Supreme Court's decision in the *Jaffree* case.

He is a cum laude graduate of Dartmouth College and a graduate of Vanderbilt School of Law. He was one of the first foreign students ever enrolled for graduate studies in the Sao Paolo School of Law, Brazil's most prestigious school of law.

As a professional, he has served as an assistant attorney general for the State of Alabama. He is a partner in the firm of Parker & Kotouc, of Montgomery, AL. Concurrently, he serves both as a special assistant attorney general for the State of Alabama and a special assistant district attorney for Montgomery County, AL.

I think, Mr. Chairman, if you have reviewed his previously written testimony, you will acknowledge that the quality of his testimony today reflects his abilities as both scholar and lawyer, and I am proud to introduce him to the subcommittee.

I am also pleased that as chairman of the Subcommittee on the Constitution, you, Mr. Chairman, have decided so promptly after the Supreme Court's decision in the *Jaffree* case, to hold a hearing on the various voluntary prayer initiatives. I share Mr. Parker's view that the case is the latest stage in a "drift from the position of Government accommodation of the religious needs of the people to a position of strict Government neutrality".

The Court's defenders often scoff at the idea that we are a people with religious faith. The events of the last few days should remind us all of just how important prayer can sometimes be in the life of a Nation. Yet, according to the Court, if a teacher in my own State this morning announced a moment of silence to be used for voluntary prayer or meditation in consideration of the needs of the victims aboard flight 847, the teacher, she or he, would be engaged in a constitutionally prohibited activity by virtue of that judgment.

The absurdity of such a holding is a subject of widespread Statewide indignation in my State and, I believe, in the United States.

The absurdity is beyond dispute in light of the history, purpose, and meaning of the first amendment, and purpose and words and practice of our Founding Fathers. Those people who favor the results in the *Jaffree* case cannot say that this is a decision in keeping with the intent of those framers.

To obtain results similar to those bound to flow from the *Jaffree* case, its proponents should have been required to seek a constitutional amendment. Instead, the Court, once again acting as its own constitutional convention, rendered a decision lacking real constitutional legitimacy.

In short, Mr. Chairman, as I believe you agree, the Congress needs to overturn this and earlier Supreme Court decisions that rendered voluntary prayer in public schools impermissible. In broad terms, the Senate came close to approving the President's proposed constitutional amendment in the last Congress. Perhaps now that the Supreme Court has carried its recently minted doctrines of establishment of religion to new extremes, the Senate will find the courage and the wisdom to champion the right of free exercise of religious rights that Americans should enjoy in public schools, buildings, and anywhere else.

Mr. Chairman, I thank you for inviting Mr. Parker to testify before this subcommittee, and I commend you for focusing congressional attention on a very important matter at a particularly appropriate time.

Senator HATCH. Well, thank you, Senator Denton.

Mr. Parker, we will turn to you.

STATEMENT OF THOMAS F. PARKER IV

Mr. PARKER. Mr. Chairman and distinguished members of the subcommittee, first, I would like to thank Senator Denton for that kind introduction, and I would like to thank the chairman and the members of the subcommittee for this opportunity just to express some thoughts and concerns about the recent decision.

As one of the attorneys for 624 teachers, parents and students in the companion cases of *Wallace* v. *Jaffree* and *Smith* v. *Jaffree*, decided by the U.S. Supreme Court on June 4, 1985, I have been a first-hand witness to the greatest setback to religious liberty that has ever occurred in this country. This happened when the majority on the Supreme Court used the *Jaffree* case to culminate a drift from a position of Government accommodation of the religious needs of the people to a position of strict Government neutrality.

The shift from accommodation to complete neutrality, in the phrase used by the Court, has severe implications. It threatens the very tax-free status of religious institutions. The granting of tax-free status to churches, synagogues, or religious charities, can be viewed as an accommodation of religion by Government which should, therefore, be prohibited under a regime of strict neutrality.

Similarly, the use of the public airways by radio and television preachers could also be viewed as an accommodation of religion by Government, which would also be prohibited under a regime of strict neutrality. To make the public airways available to religious groups could be viewed as a prohibited accommodation of religion. The end result of this type reasoning would be governmentally

forced privatization of religion and State-caused atrophy of the faith. The Court's apparent acceptance of Justice O'Connor's no-endorsement-of-religion test, if fully applied, endangers even our national motto, our national anthem, and the Pledge of Allegiance, among other things.

Unfortunately, neutrality in this day and age is not really neutral. We have arrived at the point where we have a semiofficially established religion of secularism in this country, under which any references to God are considered the new blasphemy. Any mention of God or Christ is viewed as challenging the very deification of man and reason under secular humanism and thus should be excised from the public realm as blasphemous under this new, semiofficially established religion.

The root cause for the shift from accommodation to neutrality lies in a change in view of the source of our rights. We can see this in the Court's distinction between toleration and accommodation.

In *Lynch*, the Court stated unequivocally that the Constitution, "affirmatively mandates accommodation, not merely tolerance, of all religion, and forbids hostility toward any. Anything less would require the callous indifference we have said was never intended by the Establishment Clause."

The essence of the difference between toleration and accommodation is the perceived origin of the rights in question. When a State tolerates a religion, civil liberties are creatures of the sovereign States' good pleasures. Religious rights are given only if, when, and for as long as expedient. Tolerance becomes intolerance when the good graces of the State or its agents change.

Accommodation, on the other hand, recognizes that liberties exist independently of government, which has not created them. Liberties are according to our Declaration of Independence, "unalienable Rights" with which men have been "endowed by their Creator," "the Supreme Judge of the World." Jefferson acknowledged the origin of these rights and their dependence on that source when he said the words which were previously quoted by Representative Barton: "God, Who gave us life, gave us liberty. Can the liberties of a nation be secure when we remove a conviction that these liberties are the gift of God?"

John Adams foresaw the danger in such a course of action as that upon which the Court has embarked when he said:

> We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other.

The U.S. Supreme Court decision in *Jaffree* and the other Establishment Clause cases constitute an unconstitutional amendment to the U.S. Constitution contravention of the explicit and exclusive amending procedure established in article V. By discarding the original meaning of the first amendment and substituting therefor its own sentiments, the Supreme Court has effectively usurped jurisdiction, which the first amendment withheld from the Federal judiciary, and has changed the original meaning of the language.

Since the majority of the Supreme Court have violated their oath of office to uphold the Constitution and have treated it as but a tool by which they, through their subjective interpretation, can im-

plement their own social agenda, rather than as a binding and fixed covenant between the people and their government, I personally support impeachment under the article III, section 1, good behavior standard. The other method available for reversing the Court's unconstitutional usurpation of jurisdiction over prayer is jurisdiction-limiting legislation under the article III, section 2, exceptions power.

The proposed constitutional amendment for silent prayer which we are considering today is a third remedy available, though much more limited in scope. While the proposed amendment would carve out but a narrow exception to the Court's decision and only restore the concept of accommodation within its limited reach, rather than in full, as needed, it may in your view by the proper step to take at this time.

Regardless of what I as an attorney view as the proper response, a step must be taken in the political arena in which you gentlemen are the experts. It is clear, though, that political response is necessitated because the Court refused the opportunity presented by the detailed historical evidence in *Jaffree* to correct its past mistakes.

The original intent of the framers of the first amendment, public policy considerations and statements in the *Jaffree* statement itself all support or permit the constitutional amendment on silent prayer. Rather than dwell on the intended meaning of the first amendment, which this subcommittee has heard testimony on from Prof. Robert L. Cord and Dr. James McClellan, whose views I share, I would just like to point out the importance of the Northwest Ordinance. One of the articles provides:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

This was enacted by the First Congress at the very time it was passing the proposed amendment that became the first amendment to the U.S. Constitution. Congress subsequently set aside section 16 in every township in the 5 State Northwest Territory to support schools to teach religion, morality, and knowledge. Certainly a moment of silence for prayer could not be unconstitutional in the view of the framers of the first amendment if they saw no violation in the establishment and support of schools to teach religion as well as morality and knowledge.

Some of the public policy considerations that would support such a constitutional amendment are as follows:

One, it would restore the recognition of God and the reverence owed him to our public school classrooms. It would countermand the appearance to tender young minds of official belittling of or hostility to religion created by the Court-ordered exclusion of prayer from the public schools.

Two, it would remove the confusion created by the Supreme Court rulings on the establishment clause, which has led to grave violations by public school administrators of the constitutional free exercise rights of teachers and students.

Three, it would restore the principle of accommodation for religious needs of teachers and students.

Four, it would remove the barrier created by the Court in the *Jaffree* decision to State accommodation of the religious needs of teachers and students.

Five, it is noncoercive.

Six, it is a neutral accommodation of the religious needs of teachers and students.

Seven, it is not divisive.

Eight, it is a constitutional means of clearing the motive barrier created by the U.S. Supreme Court in its *Jaffree* decision.

Nine, it would settle once and for all the question of constitutionality of statutes permitting a moment of silence without having to go through the long, involved course that the Court envisions of checking the legislative motive behind each and every statute.

And 10, it would provide a moment to still the class and settle the minds before the work of the school day begins.

I would, however, propose the insertion of the word "such" or "silent" before the word "prayer" on page 2, line 6, so that the last phrase of the second sentence will read: "* * * nor shall they encourage any particular form of such prayer or reflection," or, if the alternative word is used, "* * * nor shall they encourage any particular form of silent prayer or reflection."

This is necessary to create parallelism with the first phrase of the second sentence, which uses the word, "such, before the recurring phrase, "prayer or reflection," and to prevent any unintended results. In the absence of such a change, the second phrase of the second sentence could be read to prohibit certain forms of prayer at public schools which the Supreme Court has never addressed, such as before or after class student prayer groups or invocations or benedictions at school graduation ceremonies or athletic events where attendance is not mandatory.

I also urge the committee to make it clear in its final report that the proposed amendment is not intended to, nor should it be interpreted as, preventing a State from enacting legislation implementing reasonable time and place provisions for silent prayer such as the statute addressed in *Jaffree*, which permitted time to be set aside at the commencement of the first class of each day.

It should be made clear that by enacting such legislation, a State should not be held to have unconstitutionally endorsed religion or a particular religious practice, as was the State of Alabama in the *Jaffree* decision.

Now, that concludes my remarks on Senate Joint Resolution 2.

I would, however, like to add the following. Governor George C. Wallace, on behalf of the citizens of the State of Alabama, has consistently supported the opportunity for prayer or silent reflection in the public schools, and I have been authorized by the Governor to express to this committee his support of any constitutional amendment that would achieve that goal.

Thank you, gentlemen.

Senator HATCH. Thank you.

[Statement follows:]

PREPARED STATEMENT OF THOMAS F. PARKER, IV

As one of the attorneys for 624 teachers, parents, and students in the companion cases of Wallace v. Jaffree[1] and Smith v. Jaffree, decided by the United States Supreme Court on June 4, 1985 (53 U. S. Law Week 4665), I have been a first-hand witness to the greatest setback to religious liberty that has ever occurred in this country. This happened when the majority on the Supreme Court used the Jaffree case to culminate a drift from a position of government accommodation of the religious needs of the people to a position of strict government neutrality. 53 U.S.L.W. at 4671.

I. ACCOMMODATION

Former United States Supreme Court Justice Story wrote the following about the meaning of the First Amendment in his 1833 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES:

> The real object of the amendment was not to countenance, much less to advance, Mahometanism [sic], or Judaism, or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. . . . §1871, at 728.
>
> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . §1868, at 726.

While the debates on the First Amendment and the contemporaneous acts of Congress indicate that the First Amendment permitted non-discriminatory aid to denominations, the

Jaffree decision says that "the Court has . . . concluded" otherwise. 53 U.S.L.W. at 4669. Though the Supreme Court has in the past equated the encouragement of religion with accommodation[2], it has, in recent times, adhered to an accommodation principle, as evidenced in Lynch:

> [The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g., Zorach v. Clauson, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, 343 U.S. at, 314, 72 S.Ct. at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." McCollum, supra, 333 U.S., at 211-212, 68 S.Ct., at 465.

Lynch v. Donnelly, 104 S.Ct. at 1359. "To hold that [the government] may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."[3]

The Court held in Marsh that "to invoke Divine guidance on a public body . . . is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." Marsh v. Chambers, 103 S.Ct. at 3336.[4]

The concept of accommodation had been adhered to by the Court as a necessary part of the free exercise clause and the establishment clause, which prohibit hostility or callous indifference to religion.[5] Government may "accommodate religious needs of the people."[6] The "limits of permissible state accommodation to religion are by no means co-extensive

with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself,"[7] and "bring us into war with our national tradition."[8] "[A]ccommodation . . . respects the religious nature of our people."[9]

II. "COMPLETE NEUTRALITY" AND ITS IMPLICATIONS

The shift from accommodation to "complete neutrality" in the Jaffree decision has severe implications. It threatens the very tax-free status of religious institutions. The granting of tax-free status to churches, synagogues, and religious charities can be viewed as an accommodation of religion by government which should, therefore, be prohibited under a regime of strict neutrality. Similarly, the use of the public airways by radio and television preachers could also be viewed as an accommodation of religion by the government, which would also be prohibited under a regime of strict neutrality. To make the public airways available to religious groups would be viewed as a prohibited accommodation of religion. The end result of this would be a governmentally-forced privatization of religion and state-caused atrophy of the faith.[10]

Unfortunately, neutrality in this day and age is not really neutral. We have arrived at the point where we have a semi-officially established religion of secularism in this country under which any references to God are considered the new blasphemy. Any mention of God and Christ are viewed as challenging the very deification of man and reason under secular humanism and, thus, should be excised from the public realm as blasphemous under this new semi-officially established religion.

The root-cause for the shift from accommodation to neutrality lies in a change in view of the source of our rights. We can see this in the Court's distinction between toleration and accommodation. In Lynch the Court stated unequivocally that

the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause". Lynch v. Donnelly, 104 S.Ct. at 1359.

The essence of the difference between toleration and accommodation is the perceived origin of the rights in question. When a state tolerates a religion, civil liberties are creatures of the sovereign state's good pleasure. Religious rights are given only if, when, and for as long as expedient. Tolerance becomes intolerance when the good graces of the State or its agents change.

Accommodation, on the other hand, recognizes that liberties exist independently of government, which has not created them. Liberties are, according to the Declaration of Independence, "unalienable Rights" with which men have been "endowed by their Creator," "the Supreme Judge of the World." Jefferson acknowledged the origin of these rights and their dependency on that Source when he said "God Who gave us life gave us liberty. Can the liberties of a nation be secure when we remove a conviction that these liberties are the gift of God?" (Inscribed on the Thomas Jefferson Memorial, Washington, D.C.)

John Adams foresaw the danger in such a course of action when he said: "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our constitution was made only for a moral and a religious people. It is wholly inadequate for the government of any other."[11]

In a new book on the adverse effects on democracy of "human passions unbridled by morality and religion," Richard John Neuhaus writes:

> The prelude to . . . totalitarian monism is the notion that society can be ordered according to secular technological reason

> without reference to religious grounded meaning. [John Courtney] Murray again: "And if this country is to be overthrown from within or from without, I would suggest that it will not be overthrown by Communism. It will be overthrown because it will have made an impossible experiment. It will have undertaken to establish a technological order of most marvelous intricacy, which will have been constructed and will operate without relations to true political ends: and this technological order will hang, as it were, suspended over a moral confusion; and this moral confusion will itself be suspended over a spiritual vacuum. This would be the real danger resulting from a type of fallacious, fictitious, fragile unity that could be created among us."
>
> This "vacuum" with respect to political and spiritual truth is the naked public square. If we are "overthrown," the root cause of the defeat would lie in the "impossible" effort to sustain that vacuum. Murray is right: not Communism, but the effort to establish and maintain the naked public square would be the source of the collapse.[12]

Such would be the result of the establishment of a "religion of secularism" condemned in Schempp, 374 U.S. at 225. The action adopted by the Court is another stride down that road.

Murray Friedman recently commented on the results of the present course of action adopted by the Court:

> But one may question whether "silent meditation . . . [is] the critical problem []. . . . May not the breakdown of the orderly norms of our society constitute, in fact, a far more serious threat to the Jewish community? To be sure, displaying the Ten Commandments on a schoolhouse wall would not in itself strike a major blow against the "new paganism," but an argument can be made that removing the institutional religious supports and symbols of decency may contribute to the decline of morality itself.[13]

Where our courts require that all religions be equated in the public square, toleration rules and free exercise is restricted. A position that prohibits one religion from advancing more than another was abhorrent to the men who wrote

the religion clauses according to Justice Story: "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . ." 3 J. STORY, COMMENTARIES, §1868, at 726 (emphasis added).

The drift from accommodation in early America towards current toleration has been slow yet steady, moving from "this is a Christian nation"[14] to "[w]e are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God"[15] to "[w]e are a religious people whose institutions presuppose a Supreme Being"[16] to "neither a State nor the Federal Government . . . can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"[17] to "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[18] When the whole spectrum is thus viewed, there is a perceptible drift from accommodation to toleration. The constitutional prohibition against "an establishment of religion" has been rewritten to prohibit any encouragement of religion in public, choking free exercise and limiting religious practice to private property.[19]

III. AVAILABLE REMEDIES

The United States Supreme Court decision in Jaffree and the other Establishment Clause cases constitute an unconstitutional amendment to the United States Constitution in contravention of the explicit and exclusive amending procedure established in article V. By discarding the original meaning of the First Amendment and substituting therefor its own sentiments, the Supreme Court has effectively usurped jurisdiction which the First Amendment withheld from the federal judiciary[20] and has changed the original meaning of the language.

Since the majority of the Supreme Court have violated their oath of office to uphold the Constitution and have treated it as but a tool by which they, through their subjective interpretation, can implement their own social agenda rather than as a binding and fixed covenant between the people and their government, I personally support impeachment under the article III, section 1 "good behavior" standard. The other method available for reversing the Court's unconstitutional usurpation of jurisdiction over prayer is jurisdiction-limiting legislation under the article III, section 2(2) "exceptions" clause.[21]

The proposed constitutional amendment for silent prayer is a third remedy available, though much more limited in scope. While the proposed amendment would carve out but a narrow exception to the Court decision and only restore the concept of accommodation within its limited reach rather than in full, as needed, it may, in your view, be the proper step to take at this time. Regardless of what I as an attorney view as the proper response, the step must be taken in the political arena in which you gentlemen are experts. It is clear, though, that a political response is necessitated because the Court refused the opportunity presented through the detailed historical evidence presented in Jaffree to correct its past mistakes.

IV. PROPOSED CONSTITUTIONAL AMENDMENT

The original intent of Framers of the First Amendment, public policy considerations, and dicta in the Jaffree decision all support or permit the proposed constitutional amendment on silent prayer.

A. HISTORY OF FIRST AMENDMENT

1. The Establishment Clause Prohibits Only the Establishment of a National Church, as Shown by its Language and Intended Meaning.

The Court declared in Lynch v. Donnelly, 104 S.Ct. at 1361, that "[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government," quoting Justice Joseph Story.[22] Many constitutional scholars have reached the same conclusion, that the establishment clause forbids only the creation of a national established church, such as former Justice Joseph Story, Professor Robert L. Cord of Northeastern University, the late Professor Mark DeWolf Howe of Harvard, Dr. James McClellan, formerly of Emory University, Professor John Baker of Louisiana State University Law School, Professor Wilbur Katz of University of Chicago Law School, Professor Peter Kauper of University of Michigan Law School, Professor Thomas Cooley of University of Michigan, Professor Edward Corwin of Princeton University, and Professor Walter Berns of University of Toronto, to mention a few.[23]

The district court in Jaffree v. Board of School Commissioners, relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION , and the testimony and studies of Professor James McClellan, reached the same conclusion as the Donnelly court:

> The First Amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. . . . The drafters of the First Amendment understood the First Amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the First Amendment.[24]

As Anson Stokes in his more exhaustive three volume work, CHURCH & STATE IN THE UNITED STATES, and Professor James

McClellan in his essay, The Making and the Unmaking of the Establishment Clause, suggest that to the drafters of the first amendment, there were seven criteria of when a church was historically established in one of the early states: (1) salaries of the ministers of that church were paid from tax money; (2) the buildings of the established church were maintained with tax funds; (3) school teachers of the established church were paid with tax money; (4) only clergy from the established church were permitted to marry and bury; (5) a penalty was levied for not attending the services of the established church; (6) only members of the established church could preach; and (7) office holding was limited to members of the established church.[25]

Five of the thirteen states had continued their religious establishments when the Constitutional Convention met in Philadelphia in 1787: Connecticut, Massachusetts and New Hampshire supported the Congregational Church, and Georgia and South Carolina the Anglican Church.[26] These states jealously guarded their religious practices and control over their public schools. They were not about to give up their authority to the federal government.[27]

During the debates over ratification of the Constitution, five states without established churches proposed amendments to the First Congress to prohibit the federal government from establishing a national sect.[28] One state, New Hampshire, where the Congregational Church was established, proposed an amendment to prevent the federal government from passing any law respecting religion.[29]

James Madison on June 8, 1789, after reworking these amendments, submitted the following amendment to the First Congress for its consideration: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed."[30]

a. Congressional Debates on the Establishment Clause

A week after Congress passed the Northwest Ordinance, encouraging the teaching of religion and morality in the schools of the Northwest Territory, it began debate on the establishment clause. The debate makes it quite clear that the establishment clause was intended only to prohibit establishment of a national church.

Professor Michael Malbin notes the importance of the article "an" prior to "establishment of religion" in the amendment's final version:

> Had the framers prohibited "the establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment", they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.
>
> Thus, through the choice of "an" over "the," conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which Congress reenacted in 1789. . . .[31]

As will be seen in the following summary of the debates, several representatives feared that the clause "no religion shall be established by law" (as proposed by the select committee on July 28, 1789) might be interpreted as hostile toward all religion. The response of James Madison and other members of the House assured these individuals that the sole purpose of the amendment was to prevent establishment of a national religion which would interfere with the state religious establishments. (Madison altered his views a decade later.)

Peter Sylvester, a lawyer from New York, opened the debate by indicating his displeasure with the select committee's

version because he feared the words could be construed "to have a tendency to abolish religion altogether."[32] New York's proposed amendment provided only that "no religious sect or society . . . be favored or established by law in preference to others."[33]

Massachusetts' anti-Federalist leader, Elbridge Gerry, proposed that the amendment be reworded to read "no religious doctrine shall be established by law," which would have permitted such federal aid to religion in general as that of the Northwest Ordinance.[34] Massachusetts' constitution of 1780 provided that Protestant religious teachers in public schools could be paid from state tax funds to instruct in "piety, religion and morality."[35]

Roger Sherman, staunch Federalist from Connecticut, stated that he saw no need for an amendment, since the federal government had no authority to deal with religion.[36]

However, Federalist Daniel Carroll of Maryland favored the amendment because "many sects ha[d] concurred in opinion that they [were] not well secured under the present constitution." He believed that the amendment would "tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed."[37] His state's constitutional proposal was almost identical to Madison's original draft.[38]

Madison responded that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," for some states were of the opinion that Congress might "establish a national religion" and had therefore required the amendment.[39]

Benjamin Huntingdon of Connecticut, protecting his state's established church, agreed with Rep. Sylvester that the words "no religion shall be established by law" might "be taken in such latitude as to be extremely hurtful to the cause of

religion." In particular he feared that the federal courts would not enforce a state law which required that citizens pay taxes to support ministers and build meeting houses. Although he favored Rhode Island's prohibition of the establishment of a religion, he did not want the amendment to be worded in a way "to patronize those who professed no religion at all."[40]

Madison then suggested a return to the language of June 8th by adding the word "national" before "religion", for "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[41] Madison's decade-later interpretation should be reviewed in light of his contemporaneous statements about the establishment clause.

Samuel Livermore of New Hampshire, reflecting strong anti-Federalist sentiment, objected to the word "national," and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws touching religion, or infringing the rights of conscience."[42] By the word "touching" Livermore apparently intended to prohibit any federal interference with the established Congregational Church of his state.

After further opposition to the word "national" from staunch anti-Federalist Elbridge Gerry of Massachusetts, who had earlier proposed the words "religious doctrine" over "national religion," Madison withdrew his motion for insertion of the word "national" before "religion." He insisted, however, on making his point clear by observing that the words "no national religion shall be established by law" did not imply that the government was a national one.[43] Then Livermore's motion passed 31 to 20.

The House was divided between the Federalists (who did not feel any amendments to the Constitution were necessary) and the anti-Federalists (who did not want any reference to a "national" government or religion in the clause and insisted on amendments

to the Constitution before it was ratified).[44] The House was also split between the states that wanted to protect their established churches from the federal government and those that wanted to prevent the establishment of a national church. However, it is clear from the debates that Congressmen from states with established churches (Connecticut and Massachusetts) and those without (New York) agreed that a narrow meaning be given to the establishment clause so that it would not prove to be hostile toward all religion, as this Court recently held in Lynch v. Donnelly, 104 S.Ct. at 1359.

After further debate the House adopted a slightly different version on August 21, 1789, restoring the words "establishing religion," which was then reported to the Senate.[45]

Although the Senate debates of September 3 and 9, 1789, were kept secret, five versions considered by that body prohibited Congress from making any law "establishing one religious sect or society in preference to others" (accepted and then amended), "establishing any religious sect or society" (defeated), "establishing any particular denomination of religion in preference to another" (defeated), "establishing religion" (accepted and then amended), and finally, as sent back to the House, "establishing articles of faith or a mode of worship."[46]

The Senate's version was referred to a conference committee on which Madison and Sherman sat.[47] The compromise "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" was submitted to first the House, then the Senate, and subsequently approved, respectively, on September 24 and 25, 1789.[48]

The Senate's approval of the words "one religious sect or society" and "articles of faith or a mode of worship" indicates that it did not intend that the federal government be prohibited from aiding all religion. Instead, the phrase "an establishment of religion" in the final version indicates that Congress simply intended to prevent the establishment of a national religious

sect or denomination, as confirmed by Madison during the debates. This narrow reading of the establishment clause is confirmed by the debates of the state legislatures which subsequently ratified it and by Congress' contemporaneous passage of the Northwest Ordinance and the Prayer Day Resolution.

b. State Ratification of the Establishment Clause

In 1785, Virginia had refused to permit state tax money to be used to support teachers of religion.[49] In 1787, its constitutional convention had ratified the federal Constitution with a proposed amendment guaranteeing "that no particular religious sect or society ought to be favored or established, by law, in preference to others."[50]

When the Bill of Rights was submitted to the Virginia legislature for ratification in the fall of 1789, many feared that the language did not adequately restrict the federal government. After adoption by the House of Delegates on November 30, 1789, the Senate postponed ratification until December 15, 1791. A statement signed by six members of the majority in the Senate may explain the two-year delay:

> The [First] Amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as it was established as the national religion of the country.[51]

The Senators apparently feared that the federal Congress would advance all religion or appropriate tax money for the

benefit of all denominations, as had been proposed and rejected in Virginia's schools in 1785. The First Congress' re-enactment of the Northwest Ordinance shows that their fears were well grounded, for this act granted federal land for religious purposes and to schools that teach religion and morality.

The fact that none of the other states objected to the wording of the establishment clause or to the First Congress' passage of the Northwest Ordinance indicates that Virginia was clearly in a minority in its views, something which this Court has often overlooked.[52]

In fact, the citizens of North Carolina apparently approved of the practice. Reverend Nicholas Collins, in an article published during the debates in the North Carolina legislature, noted how a multiplicity of sects would prevent an establishment and advocated that every state and the federal government in the territories should provide a system of education "with sensible teachers, who shall instruct their pupils in the capital principles of religion, which are generally received, such as the being and attributes of God, his rewards and judgments, a future state, etc."[53] The Northwest Ordinance, whose history and impact is discussed below, fulfilled Collins' desires for inclusion of religion in the curriculum in schools under federal control.

2. Contemporaneous History of Passage of the Northwest Ordinance by the First Congress

The Northwest Ordinance, enacted by the very Congress that adopted the first amendment, provides:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Ch. 8, art. 3, 1 Stat. 50, 52 (Aug. 7, 1789) (emphasis added).

Justice Douglas, concurring in Engel v. Vitale, 370 U.S. at 443, noted that "[r]eligion was once deemed to be a function of the public school system" (quoting the Northwest Ordinance set out above).[54] However, the Supreme Court has never examined Congress' contemporaneous passage of the Ordinance to see what light it sheds on the meaning of the establishment clause.

On July 10, 1787, a committee consisting of James Madison of Virginia, Nathan Dane of Massachusetts, and three other members of the Continental Congress reported a resolution authorizing a contract for surveying and sale of federal lands northwest of the Ohio River.[55] Lot No. 16 in each Township was given perpetually for the purpose of "public education" (as set out in the Ordinance of May 20, 1785), and Lot No. 29 in each Township was given perpetually for "the purposes of religion."[56]

On July 13, 1787, Congress specified the use to be made of the land set aside for public education. It passed the Northwest Ordinance which provided: "Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[57]

The Ordinance was drafted by Nathan Dane of Massachusetts, who wanted Eastern politics to be extended to the new territories and especially to Ohio, since many of its settlers had emigrated there from New England.[58] The Ordinance is a deliberate rejection of the philosophy of Thomas Jefferson, who had led the fight against tax support of religious teachers in 1785.[59]

The Ordinance follows the language of the Massachusetts and New Hampshire Constitutions of 1790 and 1784, respectively. These required the local towns to appropriate tax money for the "support and maintenance of public Protestant teachers of piety, religion and morality" who would provide "public instruction in morality and religion."[60]

When the First Congress assembled, Rep. James Madison, on June 8, 1789, reworked the proposed constitutional amendments

from the states, and submitted his version of the establishment and free exercise clauses to Congress for its consideration. His proposal stated: "nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed."[61]

On July 13, 1789, the House constituted itself a committee of the whole to debate the disposition of lands in the Northwest Territory.[62] In the meantime (on July 21, 1789), after sitting idle for a month and a half, Madison's proposals for constitutional amendments, along with those of the states, were submitted to a select committee of which he was a member.[63] The same day the Northwest Ordinance had its first reading in the Senate.[64] A week later (on July 28, 1789), the select committee submitted the following version of the establishment clause to the House: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[65]

Then on August 7, 1789, Congress re-enacted the Northwest Ordinance, which provided in Articles I and III:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory. . . .
>
> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[66]

The fact that Congress re-enacted the Northwest Ordinance in 1789, 58 days prior to its adopting the establishment clause in final form, indicates that Congress gave its tacit approval to Nathan Dane's plan to extend governmental support of religious teaching in public schools in the Northwest Territories, and that the First Congress did not view that as the establishment of a religion.[67] Moreover, Justice Douglas' statement in Engel about the religious function of the public school system is correct, a function which in 1789 was not seen as a violation of the establishment clause. Engel v. Vitale, 370 U.S. at 443.

According to Chief Justice Burger in Marsh v. Chambers, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent." 103 S. Ct. at 3334 (emphasis added).[68]

This legislative history clearly demonstrates that the First Congress saw no conflict between the establishment clause and encouragement that religion be taught and prayers be given in the public schools in the Northwest Territory created by grants of federal land. Nor did it believe that a child would be molested in his mode of worship or religious sentiments (Article I of the Ordinance) if he were compelled to study religion in school. Instead, Congress believed that religion and schools in which religion and morality were taught were necessary to good government and the happiness of mankind. President Washington shared this belief.[69] For the men who drafted the first amendment, advancing religion and religious teaching fulfilled a vital secular purpose, establishment of good government.[70]

3. Contemporaneous History of Prayer in Federal Public Schools

When the First Congress encouraged the teaching of religion in the schools of the Northwest Territory, it intended and fully understood that prayer and Bible reading would be practiced in these schools, for this was the almost universal practice in the early constitutional period.[71] Since the Ordinance was patterned after the Massachusetts and New Hampshire Constitutions, the practice of these states is especially relevant.[72]

Anson Phelps Stokes, whose treatise and exhaustive research is highly respected on the subject of religion in American public and private schools, concludes that the fathers of the republic were accustomed "to the teaching of religion in

virtually all schools."[73] The practice applied equally to the federal territories, the states and Washington, D.C., as noted by contemporaneous acts of early Congresses.

When Congress created the Mississippi Territory in 1798, from which Alabama was later formed, it encouraged the teaching of religion and morality in its schools by providing that the people of the territory "shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio," in the ordinance of July 13, 1787.[74] This applied the "religion" in public schools' language of the Northwest Ordinance to the Mississippi Territory. Four years later Congress reserved a section in each township for "the support of schools."[75]

When Alabama was admitted into the Union in 1819, article 6 of its constitution required that "the general assembly . . . take measures to preserve from unnecessary waste or damage such lands as are, or hereafter may be, granted by the United States for the use of schools within each township in this State, and apply the funds which may be raised from such lands in strict conformity to the object of such grant."[76] The Alabama School Code of 1927 refers to article III of the Northwest Ordinance as the "parent of the educational laws of the several states and of the United States of America" and states that "religion, morality, and knowledge [are] necessary" for good government.[77]

Because the Supreme Court has refused to permit Alabama school students and teachers to have a moment of individual silent prayer or meditation, the State of Alabama is unable to carry out the very purpose of the grant of Section 16 lands as specified by the First and Fifth Congresses. Moreover, because the lands were granted by the federal government with this provision, they theoretically might now be subject to being taken back by the federal government if the state can no longer carry out the purpose for which they were granted.

Both Ohio and Mississippi also received federal school land in return for their willingness to teach religion and morality in schools financed by these lands, and Ohio even agreed with the First Congress that such a provision as to use of school lands was not a violation of the establishment of religion under its state constitution.[78]

The federal public schools in Washington, D.C. provide another strong example. When the first school district was organized in Washington, D.C. in 1820, the Bible and the Watts Hymnbook were perhaps the only textbooks. Thomas Jefferson was the president of the school board. His approval of this curriculum is significant since the school was operated on federal land under congressional supervision.[79]

Congressional grants for evangelistic activities also provide important contemporaneous history. Early Congresses felt it their Christian duty to civilize the Indians in the federal territories by financially assisting the spread of the Gospel. President Washington proclaimed a treaty on January 21, 1795, with the Oneida, Tuscorora, and Stockbridge Indians by which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," New York, in place of the one which the British had burned in the Revolutionary War.[80]

Under Presidents Washington, Adams and Jefferson, Congress granted twelve thousand acres and extended the grant on five occasions to the Moravians or "Society of the United Brethren, for propagating the gospel among the heathen" or Indians.[81] None of the three Presidents vetoed these six acts, indicating that they did not find them to be a violation of the establishment clause.

On October 31, 1803, Jefferson asked the Senate to give consent to a treaty with the Kaskaskia Indians that contained the following clause.

> And whereas, The greater part of said tribe have been baptized and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.[82]

Professor Cord cites page after page of early Congressional enactments that provided federal land or appropriated federal funds to establish and fund Indian schools to the Moravians, the Missionary Society of New York, the Hamilton Baptist Missionary Society of New York, the American Board of Commissioners for Foreign Missions, the Baptist Board for Foreign Missions, the Cumberland Missionary Society, the United Foreign Mission Society of New York and the Foreign Mission Society of the Synod of South Carolina.[83]

These contemporaneous acts of the early Congresses indic. that prayer and the teaching of religion in schools under federal control were seen as fulfilling a valid national purpose, the moral and spiritual preparation of Americans to take a useful role in our society. Especially the Indians, who had not previously experienced the benefits of a Christian civilization, would be better citizens by their receiving the Gospel, and Congress singled out specific denominational groups to propagate it. However, since no national church was being established in doing so, neither Congress nor the courts found these acts offensive to the first amendment. Applying the historical test to the establishment clause, a state may constitutionally allow a period for silent individual prayer or meditation.

4. Contemporaneous History of Prayer in Other Governmental Institutions

The day after the first amendment was approved in the House in its final form, Federalist Elias Boudinot of New Jersey asked that "all the citizens of the United States [be offered an opportunity] of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured upon them." By resolution, he requested that the President "recommend to the people of the United States a day of public thanksgiving and prayers."

However, Mr. Boudinot went further, even suggesting to the people the form of the prayer, "to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness."[84] Although the resolution does not specify if the prayer should be verbal or silent, verbal prayer is implied by calling for public prayer, which was customarily oral in the eighteenth century.

Anti-Federalist Aldanus Burke of South Carolina immediately objected to "this mimicking of European customs, where they made a mere mockery of thanksgivings."[85] Thomas Tucker, also of South Carolina, but a Federalist, objected to the resolution because it was "a religious matter, and, as such, proscribed to [Congress]," apparently referring to the establishment clause passed the day before.[86]

Roger Sherman, a Connecticut Federalist, perhaps reflecting the position of the established Congregational Church of his state, found precedent for such days of thanksgiving in Scripture as at the time Solomon built the temple and "worthy of Christian imitation on the present occasion."[87] Mr. Boudinot quoted further precedents from the practice of the Continental Congress. The motion carried and President Washington on October 3, 1789, issued the Proclamation.[88]

As Chief Justice Burger points out in Marsh v. Chambers, 103 S. Ct. at 3333, the evidence of opposition to and subsequent

approval of a resolution "infuses [the force of the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."

Since the resolution was directed toward all the people of the United States, both adults and children, apparently teachers and students were to participate. As with the Northwest Ordinance, there is no evidence that Congress sought to protect children from being compelled to pray. Instead, there is evidence that Congress intended to include them without any fear that it was establishing a religion by doing so.

Prayers were offered in the Congress, in the courts, and after the first inaugural ceremony at St. Paul's Chapel led by the congressional chaplain.[89] Also, the First Congress authorized the President "by and with the advice and consent of the Senate" to appoint a chaplain for the "military Establishment of the United States."[90] Of great significance is Jefferson's Act of April 10, 1806, which "earnestly recommended" that army officers and enlisted men attend Divine worship services. Irreverent behaviour by officers at Divine worship services was to be punished by court marshal with presidential reprimand.[91]

After a comprehensive 302-page examination of the debates and acts of Congress and the individual states, Professor Cord concludes, as has this Court, that Congress intended only to prevent the establishment of a national church. He adds: "[n]or does any substantial evidence suggest that nondiscriminatory or indirect aid to religion or to religious institutions was to come under the ban of the First Amendment."[92] The proposed Constitutional amendment does not establish any national religion; instead, its allowing permissive silent prayer or meditation "respects the religious nature of our people and accommodates the public service to their spiritual needs." Zorach v. Clauson, 343 U.S. at 314.

B. PUBLIC POLICY CONSIDERATIONS

Some of the public policy considerations supporting the proposed constitutional amendment on silent prayer are:

1. Restoration of the recognition of God and the reverence owed Him to the public school classrooms. It would countermand the appearance to tender, young minds of official belittling of or hostility to religion created by the Court-ordered exclusion of prayer from the public schools.

2. Removal of the confusion created by the Supreme Court rulings on the establishment clause which had led to grave violations by public school administrators of the constituional free exercise rights of teachers and students.

3. Restoration of the principle of accomodation for the religious needs of teachers and students.

4. Removal of the barrier created by the Court in Jaffree to state accommodation of the religious needs of teachers and students.

5. It is non-coercive. No one will be required to pray nor will their freedom of conscience ever be violated if they do or do not. No one will ever know how a teacher or student uses the moment of silence. It relieves teachers of the role of thought police in which they are placed by a prohibition against silent prayer.

6. It is a neutral accommodation of the religious needs of teachers and parents. No preference is given to any particular form of silent prayer. It is non-discriminatory in impact, even in the face of the growth of pluralism in our society.

7. It is not divisive. In fact, it will remove some of the divisiveness and politicalization of public school prayer caused by the U.S. Supreme Court in its establishment clause rulings since 1962.

8. It is a constitutional means of clearing the "motive" barrier created by the U.S. Supreme Court in Jaffree. A constitutional amendment, once passed, is incapable of being challenged for unconstitutional intent.

9. Settling of the question of constitutionality of statutes permitting a moment of silence once and for all without having to go through the long involved course that the Court envisions of checking the legislative motives behind each and every one.

10. Provision of a moment to still the class and settle the minds before the work of the school day begins.

C. THE JAFFREE DECISION

At the same time that the Court erected an insurmountable barrier to moment of silence legislation by utilizing a test which always provides a negative result, the Court did imply, in the majority opinion by Stevens, that it would be constitutionally permissible to protect a student's constitutional right to pray. 53 U.S.L.W. at 4671.

In her concurring opinion, Justice O'Connor recognized the possibility of constitutionality of moment of silence statutes:

> Nothing in the United States Constitution as interpreted by this Courts or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day . . .
>
> Id. at 4673.

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy . . . .
>
> . . . First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.
>
> Id. at 4674.

> . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children.
>
> By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period. . . . Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.
>
> . . . Since there is arguably a secular pedagogical value to a moment of silence in public schools . . . .
>
> . . . A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.
>
> Id. at 4675.

Justice Powell agreed in his separate concurring opinion:

> . . . I agree fully with Justice O'Connor's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well.
>
> Id. 4672 (citations omitted).

V. SUGGESTED CHANGES TO THE PROPOSED AMENDMENT

I would propose the insertion of the word "such" or "silent" before the word "prayer" on page 2, line 6, so that the last phrase of the second sentence will read ". . . nor shall they encourage any particular form of such prayer or reflection . . ." or " . . . nor shall they encourage any particular form of silent prayer or reflection ." This is necessary to create parallelism with the first phrase of the second sentence which uses the word "such" before "prayer or reflection" and to prevent any unintended results. In the absence of such a change, the second phrase of the second sentence could be read to prohibit certain forms of prayers at public schools which the Supreme Court has never addressed, such as before or after class student prayer groups or invocations or benedictions at school graduation ceremonies or athletic events where attendance is not mandatory.

I also urge the Committee to make it clear in its final report that the proposed amendment is not intended to nor should it be interpreted as preventing a state from enacting legislation implementing reasonable time and place provisions for silent prayer, such as the statute addressed in Jaffree which permitted time to be set aside at "the commencement of the first class of each day." It should be made clear that by enacting such legislation a state should not be held to have unconstitutionally endorsed religion or a particular religious practice as was the State of Alabama in the Jaffree decision.

FOOTNOTES

[1] Governor George C. Wallace, in behalf of the citizens of the State of Alabama, has consistently supported the opportunity for prayer or silent reflection in the public schools and I have been authorized by the Governor to express to this Committee his support of any constitutional amendment that would achieve that goal.

[2] Justice Douglas, writing for the Court in Zorach v. Clauson, said the following on accommodation: "When the state encourages . . . or cooperates with . . . sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. Zorach v. Clauson, 343 U.S. at 313-14 (emphasis added).

[3] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[4] See also Mueller v. Allen, 103 S.Ct. 3062 (1983) (tuition tax credits); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) (exemption of religious school employees from unemployment taxes); Gillette v. United States, 401 U.S. 437 (1971) (exemptions from compulsory military service for religious objectors); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); Arlans Dep't Store, Inc. v. Ky., 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatarians); McGowan v. Md., 366 U.S. 420 (Sunday closing laws); Zorach v. Clauson, 343 U.S. 306 (off-premises public school release time programs); and Quick Bear v. Leupp, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). Cf. Widmar v. Vincent, 454 U.S. 263 (1981) (striking down prohibition on religious group meetings on public university campus); McDaniel v. Paty, 435 U.S. 618 (1978) (striking down prohibition on service by ministers as delegates to state constitutional convention).

[5] Lynch v. Donnelly, 104 S.Ct. at 1359.

[6] Zorach v. Clauson, 343 U.S. 306, 315 (1952).

[7] Walz v. Tax Commission, 397 U.S. 664, 673 (1970).

[8] Lynch v. Donnelly, 104 S.Ct. at 1359.

[9] Id. at 1361.

[10] The Court's apparent acceptance of Justice O'Connor's "no endorsement of religion" test, if fully applied, endangers our National Motto, our National Anthem, and the Pledge of Allegiance, among other things. 53 U.S.L.W. at 4670 and n. 42 and 4671 and n. 52.

[11] Quoted in R. NEUHAUS, THE NAKED PUBLIC SQUARE 95 (1984).

[12] R. NEUHAUS, THE NAKED PUBLIC SQUARE 85 (1984). See also id. at 100-03, 80-82, 84-87. After reading Neuhaus' insightful analysis, one might ponder if Judeo-Christian religious references are becoming the new blasphemy under an established "religion of secularism."

[13] Keynote speech by Murray Friedman at the annual meeting of the Association of Jewish Community Relations Workers (June 1980), printed as Friedman, A New Direction for American Jews, COMMENTARY, Dec. 1981, at 43 (emphasis in original and added).

> In striving for the separation of church and state, . . . agencies earnestly believed they were preventing harassment and providing safeguards for Jews, religious dissenters, and nonbelievers. Their activities, however, reflected a secular bias that was at best indifferent, when it was not actively hostile, to religion itself. They chose not to see that the "church" they sought to disestablish was not just a sect but embraced a collection of beliefs and values deeply embedded in the society, values which while causing uneasiness in religious outsiders, provided an order and coherence that had made it possible for Jews (and others) not only to live comfortably but indeed to prosper.

Id. at 39.

14 Church of the Holy Trinity v. United States, 143 U.S. 226, 232 (1892).

15 United States v. MacIntosh, 283 U.S. 605, 625 (1931).

16 Zorach v. Clauson, 343 U.S. at 313.

17 Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

18 United States v. Seeger, 380 U.S. 163, 166 (1965).

19 See R. NEUHAUS, THE NAKED PUBLIC SQUARE 80-82 (1984) for a perceptive discussion of the theological implication of this drift. Jeremiah 17:5.

20 See Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845).

In his second inaugural address Thomas Jefferson said,

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies. 3 A. BERGH, WRITINGS OF THOMAS JEFFERSON 378 (1903).

Jefferson's view of the First Amendment as expressed in 1805 in his second inaugural address is identical with his view expressed in 1798 when he drafted the Kentucky Resolutions. 4 THE ANNALS OF AMERICA 63 (1968). In these resolutions, Jefferson also stated that the federal courts were excluded from jurisdiction over religious matters.

Justice Story (1770 to 1845), a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as Professor of Law at Harvard Law School, agreed with Jefferson. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1879 at 634 (1891).

21 See, e.g., Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing) Debate, 36 STAN. L. REV. 895 (1984).

22 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1871, at 728 (1833) [hereinafter cited as STORY'S COMMENTARIES], also quoted by Chief Justice Warren in McGowan v. Maryland, 366 U.S. 420, 441 (1961). Accord, McCollum v. Bd. of Educ., 333 U.S. at 244 (Reed, J., dissenting). Joseph Story was a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as professor of law at Harvard Law School.

23 See also Justice Rehnquist, dissenting, in Thomas v. Rev. Bd., 450 U.S. 707, 721-22 (1981) and in Stone v. Graham, 449 U.S. 39, 45-46 (1980); Justice Stewart, dissenting, in Abington School Dist. v. Schempp, 374 U.S. 203, 309-310 and Engel v. Vitale, 370 U.S. at 445; and Justice Reed, dissenting, in McCollum v. Bd. of Educ., 333 U.S. at 245-46, where he refers to Jefferson's accommodation of religious sects at the University of Virginia.

24 Jaffree v. Bd. of School Comm'rs., 554 F. Supp. at 1115.

25 1 A. STOKES, CHURCH & STATE IN THE UNITED STATES 358-446 (1950); McClellan, The Making and the Unmaking of the Establishment Clause in A BLUEPRINT FOR JUDICIAL REFORM (1981), at 300-08. See also Larson v. Valente, 456 U.S. 228, 244, n. 19 (1982) for Massachusetts' experience.

26 R. CORD, SEPARATION OF CHURCH AND STATE 4 (1982).

27 The tension between these five states and the five states which petitioned the First Congress for an amendment preventing establishment of a national religion will become apparent in the debates on the establishment clause, discussed infra in subsection 1. The vote of three-fourths or ten of the thirteen states required by article V of the United States Constitution for the adoption of an amendment would have been impossible to attain if the first amendment had been intended to disestablish the state churches of these five states.

28 Virginia and North Carolina proposed identical amendments dealing with religion: "[N]o particular religious sect or society ought to be favored or established by law in preference to others." 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (2d ed. 1836) (emphasis added) [hereinafter cited as ELLIOT'S DEBATES] (Virginia, emphasis added); 4 id. at 244 (North Carolina). The resolution of the Rhode Island Convention echoed Virginia's, 1 id. at 334.

The New York Convention demanded that "no religious sect or society . . . be favored or established by law in preference to others." 1 id. at 328 (emphasis added). Although Maryland's Convention offered no official demands for amendments, a proposed amendment read: "That there be no National Religion established by law; but that all persons be equally entitled to protection in their religious liberty." 2 id. at 553. See CORD supra note 26, at 6, 11.

29 New Hampshire's ratifying convention proposed that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ELLIOT'S DEBATES, supra note 28, at 326.

30 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added).

31 M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978) (emphasis added), cited by R. CORD, supra note 26, at 11-12.

32 1 ANNALS OF CONG. 729 (J. Gales ed. 1789) (emphasis added). See also C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSE 123-42 (1964) [hereinafter cited as ANTIEAU, DOWNEY & ROBERTS].

Professor Michael Malbin, supra note 31, at 7, suggests that Sylvester had two premises in mind as he spoke:

> (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival.

33 1 ELLIOT'S DEBATES, supra note 28, at 328 (emphasis added).

34 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). As pointed out by Rep. Gerry later in the debate, the Federalists favored ratifying the Constitution as it was while the anti-Federalists wanted amendments before ratification. Id. at 731.

35 MASS. CONST. of 1780, Pt. I, art. III (1780).

36 1 ANNALS OF CONG. 730 (J. Gales ed. 1789). Connecticut also had established the Congregational Church.

37 Id. Malbin believes these remarks were directed to the anti-Federalists.

38 2 ELLIOT'S DEBATES, supra note 28, at 553.

39 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). This sentence was quoted by Justice Reed, dissenting, in McCollum v. Bd. of Educ., 333 U.S. 203, 244 (1948), to support his conclusion that "[t]he phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church." Justice Reed believed that Madison "by no means interpreted it to inhibit Congress from encouraging religion," according to F. O'Brien. F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 132 (1958).

40 1 ANNALS OF CONG. 730 (J. Gales ed. 1789).

41 Id. (emphasis added).

42 Id. at 731 (emphasis added).

43 Id.

44 See remarks of Rep. Gerry, id.

45 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 107 (1789). "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Id.

46 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 70, 77 (emphasis added) [hereinafter cited as SENATE J.].

47 Also, on September 7, 1789, the Senate defeated an amendment that would have prohibited the states from infringing on the rights of conscience. Id. at 72.

48 1 ANNALS OF CONG. 913 (J. Gales ed. 1789) and 1 SENATE J. 88 (1789) (emphasis added).

49 See Everson v. Bd. of Educ., 330 U.S. 1, 11-13 (1947).

50 3 ELLIOT'S DEBATES, supra note 28, at 659.

51 JOURNAL OF THE VIRGINIA SENATE 51 (1789) (emphasis added).

52 For an exhaustive study of the state legislative debates on the establishment clause, see ANTIEAU, DOWNEY & ROBERTS, supra note 32, at 143-58.

53 Fayettville Gazette, Sept. 14, 21; October 12, 1789. This article was also widely circulated in an influential magazine, 5 THE AMERICAN MUSEUM 303 (October 1789), after being published in the New York newspapers in June 1789. ANTIEAU, DOWNEY, & ROBERTS, supra note 32, at 157 add: "[w]hen this statement is considered in relation to the events in the first convention, it is apparent the citizens of North Carolina did not intend to embody a revolutionary principle in the First Amendment which would strip the federal government of power to recognize the need of her religious citizens."

54 (Emphasis added). The Ordinance was also referred to in Jones v. Opelika, 316 U.S. 584, 622 (1942); Meyer v. Neb., 262 U.S. 390, 400 (1922); and Andrus v. Utah, 446 U.S. 500, 522 n. 3 (1980) (Powell, J., dissenting).

55 32 J. OF THE CONTINENTAL CONG. 311 (1787).

56 Id. at 312 (emphasis added); Ordinance of May 20, 1785, art. 3, 28 Id. at 375, 378, dealing with grants of land to public education. See Andrus v. Utah, 446 U.S. at 522-23.

57 Northwest Ordinance, art. 3, 32 J. OF THE CONTINENTAL CONG. 334, 340 (1787) (emphasis added).

58 Letter from Nathan Dane to Rufus King (Aug. 12, 1787), reprinted in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 636 (E. Burnett ed. 1936).

59 F. PHILBRICK, THE LAWS OF ILLINOIS TERRITORY, 1809-1818 cccxxiv-cccxxv (1950).

60 Massachusetts, the first colony to pass a public school law in 1647 requiring each township to appoint an individual to teach children the "knowledge of the Scriptures," provided by its Constitution of 1780:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community but by the institution of public worship of God, and of public instructions in piety, . . . the legislature shall from time to time authorize and require, the several towns . . . to make suitable provision at their own

> expense, for the institution of public worship of God, and for the support and maintenance of public protestant teachers of piety, religion, and morality. . . .

MASS. CONST. of 1780, Pt. I, art. III (emphasis added).

The New Hampshire Constitution of 1784 also required "public instruction in morality and religion" and empowered "the legislature to authorize . . . the several towns . . . to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality." N.H. CONST. of 1784 art. VI (emphasis added). The rationale for this was that "morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government. . . ." Id.

Georgia, which had established the Episcopal Church in 1784, also recognized the importance of religion in education, granting 20,000 acres in each county for a collegiate seminary of learning for this reason: "And whereas the encouragement of religion and learning is an object of great importance to any community, and must tend to the prosperity, happiness, and advantage of the same. . . ." Act of Feb. 25, 1784, WATKINS DIGEST 293 (1800) (emphasis added).

61 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added).

62 Id. at 646 (J. Gales ed. 1834).

63 Id. at 660, 665 (J. Gales ed. 1789).

64 Id. at 52 (July 21, 1789) (J. Gales ed. 1834).

65 Id. (J. Gales ed. 1789) at 729. See ANTIEAU, DOWNEY & ROBERTS, supra note 32 at 123-42, referred to favorably by Chief Justice Burger in Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 & 675 n. 3 (1964), for a detailed account of the debates and related newspaper accounts and letters.

66 Northwest Ordinance, ch. 8, arts. I & III, 1 Stat. 50, 52 (1789) (emphasis added).

67 The Ordinance also contradicts Justice Douglas' belief in McGowan v. Md., 366 U.S. 420, 563 (1961) (dissenting opinion) that the establishment clause requires that "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government."

68 Accord, Wis. v. Pelican Ins. Co., 127 U.S. 265, 297 (1888); Boyd v. United States, 116 U.S. 616, 623 (1886); see also United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2582 (1983); United States v. Ramsey, 431 U.S. 606, 616-17 (1977); Walz v. Tax Comm'n., 397 U.S. at 686 (Brennan, J., concurring); Frank v. Md., 359 U.S. 360, 370 (1959), (reh'g denied) 360 U.S. 914 (1959); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 327-28 (1936); Myers v. United States, 272 U.S. at 174-75, quoted with approval in Lynch v. Donnelly, 104 S.Ct. at 1359; Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

69 President Washington in his Farewell Address of 1796 expressed the same conviction: "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 5 W. IRVING, LIFE OF GEORGE WASHINGTON 343 (1860).

[70] The Northwest Ordinance shows that religious teaching may fulfill a secular end without violation of the establishment clause. As this Court held in Lynch v. Donnelly: "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated wholly by religious consideration." 104 S.Ct. at 1362 (emphasis added).

[71] Walter H. Small cites numerous regulations from various New England communities requiring headmasters to begin and even end the school day with prayer. W. SMALL, EARLY NEW ENGLAND SCHOOLS 301-03 (1969). See letters and reports collected under the topic Schools As They Were Sixty Years Ago in the AMERICAN JOURNAL OF EDUCATION concerning Connecticut which had morning prayers and Bible study with the Bible as the only reading book until 1793: THE AMERICAN LEGACY OF LEARNING 161-62 (J. Best & R. Sidewell eds. 1967); 13 AM. J. EDUC. 123, 129-32 (1863); 16 id. at 137 (1866); 26 id. at 225 (1876). Delaware school opened by prayer and singing a hymn: 17 AM. J. EDUC. 187-88 (1867). Rhode Island students daily recited the Lord's Prayer and Ten Commandments: 27 id. at 707, 711-12 (1877).

[72] According to excerpts from the Massachusetts Common School Journal, "the Bible was the only reading book, Dilworth's Spelling Book was used, and the New England Primer." This Primer contained the Lord's Prayer, the Ten Commandments, books of the Old and New Testaments, and the Shorter Catechism. 12 MASS. COMMON SCHOOL J. 311-12, quoted in 14 AM. J. EDUC. 746 (1863). In 1789, before the establishment clause was adopted by Congress, the Massachusetts legislature required all common school teachers to be certified by a minister or ministers of the community in which they were to teach that each was morally qualified for the job. Act of June 25, 1789, ch. 19, 1789 Mass. Acts 416, 418. For a study of the content and broad influence of the New England Primer and use of the Bible as a leading textbook, see S. COHEN, A HISTORY OF COLONIAL EDUCATION 1607-1776 60-63, 141 (1974) and 30 AM. J. EDUC. 371 (July 1880).

In New Hampshire the school day began and often ended with prayer and reading from the Bible, which, with the Psalter and New Testament, were the only reading books until the time of the Revolution. See, e.g., W. SMALL, supra note 71, at 300-04; W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (C. Johnson ed. 1928).

[73] 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 48 (1950).

[74] Act of Apr. 7, 1798, ch. 28, §6, 1 Stat. 549, 550.

[75] Act of Mar. 3, 1803, ch. 27 §§ 11 & 12, 2 Stat. 229, 233-34; Act of Mar. 3, 1817, ch. 62, §3, 3 Stat. 375 (dealing with survey).

[76] ALA. CONST. of 1819, art. VI (emphasis added).

[77] ALABAMA SCHOOL CODE 7 (1927). North Carolina adopted the Northwest Ordinance verbatim under article IX, §1 of its 1868 constitution. See N.C. CONST. of 1868, art. IX, §1.

[78] In the same section of the 1802 Constitution that protects Ohio's citizens against the establishment of religion and in their rights of conscience, Ohio's Constitutional Convention (and subsequently Congress by its admission of Ohio into the Union) approved this clause: "But religion, morality, and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction

shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." OHIO CONST. of 1802, art. VIII, §3. Also, Mississippi, in receiving federal school lands, provided in §14 of the seventh article of its 1817 constitution: "Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State."

79 J. WILSON, 1 PUBLIC SCHOOLS OF WASHINGTON 4-6 (Records of the Columbia Historical Society of 1897). Jefferson, as author of the much quoted "wall of separation" phrase, apparently saw no conflict between this federal public school practice and the establishment clause. However, Jefferson's views are really not relevant to the meaning of the establishment clause, because he did not participate in the first amendment debates, and was instead in Europe as minister of France from 1784 to November 1789.

80 Treaty of Dec. 2, 1794, art. 4, 7 Stat. 47-48.

81 Act of June 1, 1796, ch. 46, 1 Stat. 490-91 (4th Cong.) (emphasis added); re-enacted Act of Mar. 2, 1799, ch. 29, 1 Stat. 724 (6th Cong.); Act of Mar. 1, 1800, ch. 13, 2 Stat. 14-16 (6th Cong.); Act of Apr. 26, 1802, ch. 30, 2 Stat. 155 (7th Cong.); Act of Mar. 3, 1803, ch. 30, 2 Stat. 236-37 (7th Cong.); and Act of Mar. 19, 1804, ch. 26, 2 Stat. 271-72 (8th Cong.), quoted in R. CORD, supra note 26, at 42-46, 62 & 263-70. Land was originally set aside by the Continental Congress for propagating the gospel among the heathen by Ordinance of May 20, 1785, 28 J. OF THE CONTINENTAL CONG. 375-81; Ordinance of July 23, 1787, 33 id. 399-401; Ordinance of July 27, 1787, id. 429-30; and Ordinance of Sept. 3, 1788, 34 id. 485-86. James Madison sat on the committee proposing this grant of land for the later ordinance.

82 Treaty with the Kaskaskia Indians of Oct. 31, 1803, No. 104, 7 Stat. 78-79 (8th Cong.) (emphasis added), quoted in R. CORD, supra note 26, at 38-39, 261-63.

83 See R. CORD supra note 26, at 63-73. In granting government land for religious purposes, Congress was simply following the practice of the states. Nine of the original thirteen states supported the teaching of religion in public or private schools with tax money or land. In addition to Massachusetts, New Hampshire, and Georgia (noted earlier, supra note 26), Rhode Island, Connecticut, New York, Pennsylvania, South Carolina and North Carolina granted state land for the support of religious schools. See, e.g., II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); 27 AM. J. EDUC. 712 (1877); VIII CONN. STATE RECORDS 100 (1795); Act of Apr. 9, 1795, ch. 75, N.Y. Laws 18th Sess. 50-51; ch. 2557, 1791-1793 Pa. Laws 71-73; Act of Dec. 21, 1799, S.C. Stat. 357; see also ANTIEAU, DOWNEY & ROBERTS, supra note 32, at 62-72, 167-74.

84 1 ANNALS OF CONG. 914 (J. Gales ed. 1789). See R. CORD, supra note 26, at 27-29.

85 Id.

86 Id. at 915. Both men had voted against the amendment the previous day.

87 Id.

88 Id. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (Richardson ed. 1901). President Washington issued a subsequent proclamation on January 1, 1795. Id. at 179-80. John Adams issued two and James Madison four during their terms as president. Id. at 268-70, 284-86, 513, 532-33, 558 & 560-61. See R. CORD, supra note 26, at 51-53, 251-60.

89 See Marsh v. Chambers, 103 S.Ct. 3330, 3333-34 (1983); Abington School Dist. v. Schempp, 374 U.S. 203, 213 & 309-10 (1963) (Brennan, J. concurring); Engel v. Vitale, 370 U.S. 421, 446-50 (1962) (Stewart, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting); and Katcoff v. Marsh, No. 79 Civ. 2986 (E.D.N.Y. Feb. 1, 1984),holding that the Army chaplaincy does not violate the establishment clause, but is an effort to allow all soldiers to worship as they choose without coercion.

90 Act of Mar. 3, 1791, ch. 28, §§1,5, 1 Stat. 222-23. The compensation for the chaplain was to be "fifty dollars per month, including pay, rations and forage." Id. §6.

91 Act of Apr. 10, 1806, ch. 20, art. 2, 2 Stat. 359-60 (9th Cong.).

92 R. CORD, supra note 26, at 50. See Lynch v. Donnelly, 104 S.Ct. at 1361.

Senator HATCH. Rev. Dean Kelley, we will turn to you now.

STATEMENT OF DEAN M. KELLEY

Reverend KELLY. Mr. Chairman, my full-time responsibility for 25 years has been religious liberty. I would like to express appreciation to you for the concern you have shown for religious liberty in a number of issues over the past few years.

Senator HATCH. Thank you so much.

Reverend KELLEY. I am here to speak for the National Council of The Churches of Christ in the U.S.A., which is a communion of 31 Protestant and Eastern Orthodox communions, with over 40 million aggregate membership in this country.

I do not purport to speak for all those 40 million, but for our governor board of about 300 members who are designated by the member denominations according to their own procedures.

In 1982, our governor board adopted a resolution directed to this general issue of prayer in public schools. It did not refer explicitly to silent meditation or prayer, but concluded with the words, "the contention that the first amendment to the Constitution provides no role for government in prescribing or providing for prayer in public schools". And to the degree that a constitutional amendment and the implementation of it would include the specific mention of prayer. We feel that it would partake of the nature of governmental sponsorship of religion, which is the basis on which we and a number of the major religious bodies in this country have opposed school prayer amendments since 1962 and 1963.

As religious people, we feel strongly that families and the religious community have both the right and the responsibility to offer their children every opportunity to experience and learn about prayer, the scripture, worship, religious history, and so on. We be-

lieve that prayer is a deeply personal matter. Communication between an individual and God are possible any time in the privacy of one's heart or in the setting of one's choice, free from Government pressure or suggestion.

Although we have opposed any form of State-sponsored prayer and devotional Bible-reading in public schools, we have favored the proposal for truly voluntary religious activity and expression by anyone at any appropriate time or place. For this reason, we have supported and testified in favor of the "equal access" legislation which Congress passed last year. We also favor the objective instruction about religion in public schools, which the Supreme Court said is entirely permissible.

But we oppose these amendments even though one might consider them almost inconsequential in either their good or ill effects upon religion, because we feel they are unjust, unwise, and unnecessary. They are unjust because there is no way fully to protect the rights of students who belong to religious minorities or to no religious tradition. Simply providing that no person shall be required to participate in prayer or reflection is inadequate protection for such children because they are forced to be different from their classmates in just the way that Dean Redlich described a moment ago. By identifying themselves as choosing not to participate in prayer, they run the risk of being subject to peer pressure from classmates who want them to conform. Children are not notoriously kind to "oddballs" among their peers. Such pressure can be humiliating and damaging to children at a time in their lives when they are highly impressionable and when being accepted by their peers is a matter of high priority for them.

In addition, the proposed amendments, in our view, are unwise because they would authorize practices in public schools that would permit Government intrusion into a realm sacred to the family and the church, and also do a real disservice to what we understand to be genuine Biblical faith.

Prayer in public schools has been a custom characteristic of a homogeneous community and nation, but ours is no longer such, and it is unwise to pretend that it is. It is religiously pluralistic, and the recent decisions of the Supreme Court were a belated recognition of that fact.

That is one reason we have a Supreme Court, and I think even those who disagree with specific decisions, as I do with some, should be thankful that there are a group of dedicated men and women devoted, without having to worry about getting reelected, to grappling day by day with the application of our constitutional principles to conditions that have developed since the Constitution was written.

Therefore, I think historic analysis of the intent of the founders is limited when it comes to determining what the proper application of those principles should be to conditions that did not exist when the Bill of Rights was adopted. There were no public schools; there was not the degree of pluralism in religion that we see today. Therefore, I think the Court has done no more than its duty to apply the first amendment as it has done to those new conditions.

The National Council of Churches cannot help but seek guidance in the scriptures for this kind of question, and we cannot forget the

fact that Christians are admonished by the Lord, Jesus Christ in the sermon on the Mount, not to make a show of prayer in public places. In Matthew, these words occur: "And when you pray, you must not be like the hypocrites, for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly, I say to you, they have their reward. But when you pray, go into your room and shut the door and pray to your Father who is in secret, and your Father who sees in secret will reward you."

Lastly, we think the proposed amendments are unnecessary, since any person can pray to God at any time or place. The Supreme Court cannot prevent it, and has not attempted to, and the Congress cannot enable it.

Prayer does not need to be long or outloud or collective to be heard and answered by the most high. It is only oral collective unison prayer that requires "State action". Since that kind of prayer is not necessarily more efficacious than the silent, inward petition of the heart made spontaneously and not just at the time scheduled by the school, it appears that the proposed amendments are being sought for some kind of symbolic reasons, to make some kind of a statement or demonstration about the nature of the public school, the State, the Nation—a demonstration which we think is not only unwise and unnecessary, but mistaken.

Indeed, there is a recurrent argument by proponents of the amendment that public schools and our whole society have deteriorated since prayer was removed from public schools, and that restoring it will rectify the accumulated ills of the past two decades, such as vandalism, violence, drug addiction, delinquency, and promiscuity. We believe that children's lives are transformed not by such superficial means, but by the models set for them in the conduct of their elders. No constitutional amendment is needed to enable adults to set a good moral and righteous example for their children. They can do that now.

The amendments are unnecessary in another respect. If they are desired to make children more fully conscious of the religious roots and nature of this society, that can be done better by instructional rather than by devotional means. That is what schools are all about—for teaching, not playing church.

It would be appropriate for the public schools to teach children about the important part that religion has played in human life, and still plays—in history, in art, in music and literature. The Supreme Court has not forbidden that—quite the contrary—it said that no education is truly complete without it. Yet few public schools are making any effort to fulfill that aspect of a "complete education" and I am sorry to say that few churches or church people are pressing them to do so.

The only ingredient that the proposed amendments would add would be to make the "silent prayer or reflection" a collective classroom enterprise—a very limited boon for religion, at best, and a possible source of impairment of existing constitutional rights and liberties, especially with respect to the limitations built up over many years against State sponsorship or favoritism in religion.

So we urge the Congress to leave the nurturing of children's practice and belief where they belong—in the family and the religious community—and to reject these proposed constitutional amendments.

I would like to mention that there is a coalition of organizations, including many church bodies who are not members of the National Council of Churches, who have been working in opposition to any form of school prayer that is State-sponsored since 1962 and 1963. I am not testifying on their behalf, but I think it important to mention some of them.

They include: The American Association of School Administrators, the American Civil Liberties Union, the Americans Friends Service Committee, the American Jewish Committee, the American Jewish Congress, Americans for Democratic Action, Americans United for the Separation of Church and State, the Anti-Defamation League of B'nai Brith, the Baptist Joint Committee on Public Affairs, the Church of Jesus Christ Scientist, the General Council of Seventh Day Adventists, the Friends Committee on National Legislation, the Lutheran Council in the United States of America, the National Coalition on Public Education and Religious Liberty, the National Council of Jewish Women, the National Education Association, the National Jewish Community Relations Advisory Council, People for the American Way, Presbyterian Church U.S.A., the Union of American Hebrew Congregations, the Unitarian Universalist Church, and the United Church of Christ.

So it is significant, I think, that there are a large number of the leaders of the major religious bodies and educational groups in this country who are opposed to the proposed amendments.

Thank you.

Senator HATCH. Thank you, Dean Kelley.

[Statement follows:]

Prepared Statement of Dean M. Kelley

My name is Dean M. Kelley. I am Director for Religious and Civil Liberty for the National Council of the Churches of Christ in the USA and have held that position since 1960. I am an ordained minister of the United Methodist Church and served local parish churches for 13 years before coming to the National Council.

The National Council of Churches is a community of thirty-one Protestant and Eastern Orthodox communions in the United States which have an aggregate membership of over 40,000,000. We do not presume to speak for all of those members. We speak for the Governing Board of the NCCC, a representative body of about 300 persons chosen by the member denominations in proportion to their size and according to their own respective processes, or for the Executive Committee, a body of about 75 persons elected by the Governing Board from its membership and including the chief executives of the most active member denominations.

This testimony is based on a Resolution of the Governing Board of the National Council of Churches adopted on May 13, 1982. In the "Resolution on Prayer in Public Schools" adopted at that time (copy attached) our Governing Board reaffirmed its earlier support of Supreme Court language describing the First Amendment to the Constitution as *providing no role for government in prescribing or providing for prayer in public schools.*

As our 1963 Policy Statement on "The Churches and the Public Schools" (copy attached) says, we believe that :

> Christian nurture and the development and practice of Christian worship are unescapable obligations of the congregation and the family.

For us, this means that government has no business establishing periods for either spoken or silent prayer during the school day, as provided for in SJ Res 2 and SJ Res 3. It goes without saying that requiring participation in any such periods would be a violation of constitutionally-protected freedoms.

As religious people, we feel strongly that families and the religious community have both the right and the responsibility to offer their children every opportunity to experience and learn about prayer, the scriptures, worship, religious history, and their own religious hertitages. We believe, too, that prayer is a deeply personal matter. Communication between an individual and God are possible at anytime, in the privacy of one's heart or in the setting of one's choice, free from government pressure or suggestion.

Although the National Council of Churches has consistently opposed efforts to amend the U.S. Constitution to permit <u>state-sponsored</u> prayer and devotional

Bible-reading in public schools, it has favored provision for truly voluntary religious activity and expression by anyone at any appropriate time or place. For this reason, we supported and testified in favor of the equal access legislation which Congress passed last year. We also favor objective instruction about religion in public schools, which the Supreme Court has said is entirely permissible (Abington v. Schempp).

SJ Res. 2 calls for a constitutional amendment providing that:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

SJ Res 3 calls for a constitutional amendment providing that:

> Nothing in this Constitutuion shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

The National Council of Churches opposes these amendments to the Constitution because they are unjust, unwise and unnecessary.

The potential for injustice lies primarily ir the fact that there is no way to protect fully the rights of students who belong to religious minorities or to no religious group. Simply providing that "No person shall be required . . . to participate in prayer or reflection" is inadequate protection for such children because they are forced to be "different" from their classmates — perhaps to remain silent if the prayer is spoken or to leave the room while others pray. By identifying themselves as choosing not to participate in prayer, they run the risk of being subjected to peer pressure from classmates who want them to be "part of the group". Such pressure can be humiliating and damaging to children at a time in their lives when they are highly impressionable and when being accepted by their peers is one of their own priorities.

The proposed amendments are unwise because they would authorize practices in public schools that would permit government intrusion into a realm sacred to the family and the church and also do a real dis-service to what we understand to be genuine Biblical faith.

Prayer in public schools is a custom characteristic of a homogeneous community and nation, but ours is no longer such, and it is unwise to pretend that it is. It is religiously pluralistic, and the 1963 decisions of the Supreme Court were a belated recognition of that fact.

/Given the widespread favorable public response to proposals to keep government out of any activities that might interfere in family life and the nuture of children by their parent, it is surprising that some people are now proposing to allow State and local governments, through the state instrumentalities of public schools, to introduce religious forms and practices that will be at odds with those which some parents are trying to inculcate in their children. In this most sensitive area of family life, the clumsy and untutored intrusion of governmental authorities, however well-intended, is especially unwise.

It is sometimes said that some children would never hear the name of God if they did not have the benefit of public school prayers, but that is precisely the kind of intrusion that some parents, if they are intentionally bringing up their children in a non-theistic approach to life — as is their right — may wish to avoid. Other parents may feel that their own particular devout form of faith will not benefit from perfunctory recitations of someone else's prayers in a non-ecclesiastical setting, and so oppose public schools prayers because they are not religious enough.

The National Council of Churches cannot overlook the fact that Christians are admonished by the Lord Jesus Christ in the Sermon on the Mount not to make a show of prayer in public places:

> And when you pray, you must not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly, I say to you, they have their reward. But when you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.
>
> (Matthew 6: 5-6)

It is especially unwise to inject prayer into a gathering of people brought together for other, and non-religious purposes, particularly when -- as in the case of public-school children — they are brought together by coercion of law. They are not without other places to pray, together with others of common belief, if they should wish to do so. And the contention that some of them may wish to pray in a public institution does not make it incumbent on others to accede to that wish. In addition, the passage of the equal access law assures that in those secondary schools which provide a limited open forum for their students, those who wish to pray together or study and discuss religion with their classmates may do so on school property before and after school.

Lastly, the proposed Constitutional amendments are unnecessary, since any person can pray to God at any time or place. The Supreme Court cannot prevent it, (and has not attempted to) nor can the Congress enable it. Prayer does not need to be long to be effective, nor oral and collective to be heard and answered by the most High. It is only oral, collective, unison prayer that requires "state action".

Since that kind of prayer is not necessarily more efficacious than the silent, inward petition of the heart made spontaneously and not just at the time appointed in school, it appears that the proposed constitutional amendments are being sought for symbolic reasons, to make some kind of a statement or demonstration about the nature of the public school, the state, the nation.

Indeed, that is a recurrent argument of proponents of a prayer amendment: that public schools -- and our whole society -- have deteriorated since prayer was removed from public schools, and that restoring it will rectify the accumulated ills of the past two decades, such as vandalism, violence, drug addiction, delinquency, and promiscuity. We believe that children's lives are transformed by the models set for them in the conduct of their elders, not by rote recitation of group prayers. No Constituional amendment is needed to enable adults to set a moral and righteous example for their children. They can do that now.

The proposed amendments are unnecessary in another respect. If they are desired to make children more fully conscious of the religious roots and nature of this society, that can be done better by instructional rather than by devotional means. It would be appropriate for the public schools to teach children about the important part religion has played in human life, in history, in art, music and literature. The Supreme Court has not forbidden that; in fact, it said that no education is truly complete without it.

> . . . it might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. (Abington v. Schempp, 1963.)

Yet few public schools are making any effort to fulfill that aspect of a "complete education," and few churches or church people are pressing them to do so.

The only ingredient that SJ Res 3 would add would be to make the "silent prayer" or reflection" a collective classroom enterprise -- a very limited boon for religion at best, and a possible source of impairment of existing Constitutional rights and liberties, especially with respect to the limitations built up over many years against state sponsorship or favoritism in religion.

We urge the Congress to leave the nurturing of children's religious practice and belief where they belong -- in the family and the religious community, and to reject these proposed constitutional amendments.

The churches and the public schools

A policy statement of the National Council of Churches adopted by General Board on June 7, 1963 in New York City

AS CHRISTIANS we acknowledge God as the ground and source and confirmer of truth, whose Spirit is ever ready to respond to men's and children's search for understanding by correcting their fumbling misapprehensions and leading them into larger and fuller truth. Teaching and learning at their highest are pursued within this recognition. As Americans we are firmly committed to the right of freedom of conscience and freedom of religion, that is, the freedom of each citizen in the determination of his religious allegiance, and the freedom of religious groups and institutions in the exercise and declaration of their beliefs.

The American tradition with respect to the relations of government and religion, often described as "separation of church and state" does not mean that the state is hostile toward, or indifferent to, religion. On the contrary, governments—national, state and local—have prevailingly acknowledged the importance as well as the autonomy of religion and have given expression to this principle in many ways.

In present-day American society, with its diversity of religious conviction and affiliations, the place of religion in public education must be worked out within this recognition of the prevailingly positive attitude of the American people as a whole toward religion and safeguarding of religious liberty.

As Christians we believe that every individual has a right to an education aimed at the full development of his capacities as a human being created by God, his character as well as his intellect. We are impelled by the love of neighbor to seek maximum educational opportunities for each individual in order that he may prepare himself for responsible participation in the common life.

Concern for the public schools

We reaffirm our support of the system of public education[1] in the United States of America. It provides a context in which all individuals may share in an education which contributes to the full development of their capacities. It serves as a major cohesive force in our pluralistic society. We also recognize that significant value derives from the fact that this system is financed by public funds, is responsive to the community as a whole, and is open to all without distinctions as to race, creed, national origin, or economic status.

Definition of roles

Religious ideas, beliefs, values, and the contributions of churches are an integral part of our cultural heritage as a people. The public schools have an obligation to help individuals develop an intelligent understanding and appreciation of the role of religion in the life of the people of this nation. Teaching for religious commitment is the responsibility of the home and the community of faith (such as the church or synagogue) rather than the public schools.

We support the right of religious groups to establish and maintain schools at their own expense provided they meet prescribed educational standards.

We support also the right of parents to decide whether their children shall attend public or non-public schools. The parent who chooses to send his children to a non-public school is not excused from the responsibility of the citizen to support and seek to improve the public schools.

Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice.

It is an essential task of the churches to provide adequate religious instruction through every means at their disposal. These include both those activities which individual churches provide within their own walls and also various joint ventures of churches involving cooperation with the public schools. Christian nurture and the development and practice of Christian worship are inescapable obligations of the congregation and the family. We warn the churches against the all-too-human tendency to look to the state and its agencies for support in fulfilling the churches' mission. Such a tendency endangers both true religion and civil liberties. At the same time, we call the churches to renewed worship, study, work and sacrifice to fulfill their mission as God's people in the world.

Place of religion in the public schools

No person is truly educated for life in the modern world who is not aware of the vital part played by religion in the shaping of our history and culture, and of its contemporary expressions. Information about religion is an essential part of many school subjects such as social studies, literature and the arts. The contributions of religious leaders, movements, and ideas should be treated objectively and broadly in any presentation of these subjects. Public school administrators and textbook producers are to be commended for the progress made to date in including objective information about religion in various subject matter fields. Teachers should be trained to deal with the history, practices, and characteristics of the various religious groups with competence and respect for diverse religious convictions. Their greatest influence will be through the life and attitudes they reflect in the classroom. They should be free as persons to express their own convictions in answer to direct questions from pupils when appropriate to the subject matter under study.

The full treatment of some regular school subjects requires the use of the Bible as a source book. In such studies —including those related to character development—the use of the Bible has a valid educational purpose. But neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program.

The Supreme Court of the United States in the Regents' Prayer case has ruled that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." We recognize the wisdom as well as the authority of this ruling. But whether prayers may be

[1] In this document the terms "public education" and "public schools" are taken to mean the system of public elementary and secondary education in the United States.

offered at special occasions in the public schools may well be left to the judgment of the board responsible for the program of the public schools in the local community.

While both our tradition and the present temper of our nation reflect a preponderant belief in God as our Source and our Destiny, nevertheless attempts to establish a "common core" of religious beliefs to be taught in public schools have usually proven unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths.

Some religious holidays have become so much a part of American culture that the public school can scarcely ignore them. Any recognition of such holidays in the public schools should contribute to better community understanding and should in no way divert the attention of pupils and the community from the celebration of these holidays in synagogues and churches.

We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens.

Church support of public schools

American public education should have the full and conscientious support of Christians and Christian churches. Therefore, we urge our constituency to continue efforts to strengthen and improve the American system of public education through positive steps such as the following:

1. Providing intelligent appraisal and responsible criticism of programs of public education;
2. Keeping informed about the needs of the public schools and studying issues related to public education as a basis for intelligent action as citizens;
3. Supporting able candidates for boards of education and being willing to serve as members of such boards;
4. Working at local, state, and national levels for improved legislative and financial support of public schools;
5. Emphasizing to prospective and present teachers the profession of public school teaching as a vocation that is worthy of the best service a Christian can give;
6. Exploring cooperative arrangements of the churches and schools whereby the church's teaching of religion may be improved.

In American education, there is a substantial inter-relation between primary, secondary and higher education.

It needs to be stressed that, in a substantial majority of publicly-maintained institutions of higher education, provision is offered for the voluntary election of courses in religion on a parity with all other subjects of the curriculum, and not infrequently for publicly-supported chaplains and other services of religion.

The question should be explored whether these arrangements through which religious instruction and services are provided within state institutions of higher education without infringement of law or offense to individual conscience may not offer suggestion for more adequate provision within the public schools of opportunities for the study of religion where desired, fully within the constitutional guarantees of freedom of conscience and of religious expression.

The vote of Board members was: 65 FOR, 1 AGAINST, 1 ABSTENTION

Note—The Greek Orthodox Church of North and South America has indicated that it disclaims and dissociates itself from this pronouncement.

RESOLUTION ON

PRAYER IN PUBLIC SCHOOLS

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.
475 Riverside Drive, New York, NY 10115

Adopted by the Governing Board
May 13, 1982

Whereas, in a Policy Statement entitled "The Churches and the Public Schools," adoped June 7, 1963, the Governing Board of the National Council of the Churches of Christ in the U.S.A. said:

"Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice...";

Whereas, the same Policy Statement also stated:

"The Supreme Court of the United States in the Regents' Prayer Case has ruled that 'In this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.' We recognize the wisdom as well as the authority of this ruling...";

Whereas, the same Policy Statement continued:

"We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens ...";

Whereas, the President of the United States has recently announced his intention to propose to Congress a constitutional amendment which could lead to the reinstatement of group prayer in public schools;

Whereas, the recitation of prescribed nondenominational prayer demeans true religion by denying the traditions of faith groups while imposing on some children religious practices which are offensive to them; and

Whereas, there is a danger that the rights of members of minority religions would not be adequately protected;

Therefore, be it resolved that the Governing Board of the National Council of the Churches of Christ in the U.S.A.:

Reaffirms its belief, as set forth in the Policy Statement on "The Churches and the Public Schools" that "Christian nurture and the development and practice of Christian worship are unescapable obligations of the congregation and the family"; and

Reaffirms its support of the Supreme Court language describing the First Amendment as providing no role for government in prescribing or providing for prayer in public schools.

Policy Base: *The Church and the Public Schools*, adopted by the General Board, June 7, 1963.

Senator HATCH. Let me turn to Senator Thurmond, who needs to leave, for his questioning or any statement he cares to make.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. Thank you very much, Mr. Chairman.

Mr. Chairman, I do have another compelling engagement, if you could indulge me for just a few minutes.

Mr. Chairman, it is a pleasure to be here today as the Constitution Subcommittee receives testimony on proposals to restore to our Nation's young people the right to pray voluntarily in school. I want to commend you, Mr. Chairman, for your leadership on this issue and for your promptness in scheduling this hearing in the wake of the Supreme Court's most recent school prayer decision, *Wallace* v. *Jaffree*.

As you know, Mr. Chairman, over the past quarter-century, in a series of Supreme Court decisions, primarily those in *Engel* v. *Vitali* and *Abington* v. *Schemp*, the practice of voluntary classroom prayer at the outset of the school day has been found in violation of the first amendment.

On June 4, 1985, in the *Jaffree* case, the Court extended its interpretation of the first amendment to strike down an Alabama statute which merely provided for a period of silence of no more than a minute, for meditation or voluntary prayer. These decisions are a clear departure from the intent of the drafters of the first amendment, as well as the understanding given it for the first 175 years of our Nation's history.

In drafting the first amendment, the Founding Fathers sought to ensure that the Federal Government not establish a national church or provide preferential treatment to any single religious order or denomination. Their purpose was to prevent any national ecclesiastical establishment.

There is absolutely nothing in the history or development of the first amendment, until the past generation, to suggest that it was designed to erect any "wall of separation" between the State and oral expressions of religious values. Indeed, there was a profound awareness of the religious roots of the Constitution on the part of the Founders, and a desire to ensure that the religious import remained a part of the Nation's constitutional and public fabric.

Today, however, the "wall of separation" has been erected, and as we have seen in the *Jaffree* decision, the wall is growing ever taller.

Mr. Chairman, I was disappointed that the effort in the Senate last year to overturn *Engel* v. *Abington* was not successful. However, strong support remains in Congress for addressing this important issue and I believe the *Jaffree* decision will rejuvenate that support.

I look forward to working with you in the effort to restore the religious freedoms of our Nation's young people.

As you know, I personally favor the approach of a constitutional amendment which would allow for voluntary vocal prayer. I believe that a purely voluntary opportunity for prayer could protect

both the rights of those who wished to pray, as well as those who did not. However, the support in Congress for this approach may be insufficient for approval. Because I believe that the approach which provides for a moment of silence for prayer and meditation is also appropriate—especially in the wake of the *Jaffree* decision—I intend to join you, Mr. Chairman, in working for the passage of that approach if we do not have support for voluntary prayer.

Now, I just have one question, but before I ask this question, I want to make this statement. As President pro tempore of the U.S. Senate, I open the Senate every morning. The first thing I do is rap order, and then call for the chaplain to pray. If we can have prayers in the U.S. Senate at the opening of the Senate, why can't we have prayers in public schools, if they are voluntary? It just does not make sense. At every inauguration we have had of every President in the history of this Nation, we have had prayers. And it seems to me that somebody has gotten offboard. I do not understand the Supreme Court in handing down the decision they did. And I feel that we should continue to hammer to try to get this matter reversed, and I think we have got to continue along that line.

Now, I must admit that I was quite surprised that the Supreme Court ruled as it did, as I said, in the *Jaffree* case. As the witnesses are aware, the Court in the *Jaffree* case found unconstitutional an Alabama statute which merely authorized a period of silence for meditation or prayer. Today, our public schools encourage the intellectual, physical, and emotional development of children. The child is educated in political theory, sex education, and hygiene. He is taught baseball and football. He is instructed in music, art, and literature. He is taught much about that which goes into the building of character.

It does not seem to me unreasonable for one to assess that as a part of the full development of children, the spiritual or reflective aspect of development is also important.

I, therefore, find it hard to understand why some people so strongly object to a statute or practice which merely provides for a moment of silence during which students may choose between a number of silent, spiritual or reflective activities, including prayer, or to merely sit silent and pass the time. It appears to me that such an activity would play a positive role in the development of students if by only calling their attention to the more reflective or spiritual aspects of life, while completely protecting the privacy of thought of each individual student.

Now, my question to you, Reverend Kelley, and to you, Dean Redlich, is if Congress should approve a constitutional amendment which allows for a moment of silence for prayer or reflection, and that amendment is ratified by the States, what harmful effects do you believe such an amendment will have on individual rights and on our society in general, if any?

Reverend KELLEY. Dean Redlich can speak for himself. I think he has already suggested something of that sort. But from the standpoint of many Christian bodies, I think they would feel that there was at least one danger from it—that that form of very attenuated, dilute, routine——

The CHAIRMAN. Excuse me. In order for those in the back to hear, would you pull your microphone a little bit closer and speak right into it?

Reverend KELLEY [continuing]. That sort of routinized attenuated, quasi-religious practice would, perhaps, tend to innoculate children against the real thing if it were to come along. If they get the impression that that is what religion is about, that might well serve to turn them off. Many young people are turned off by public school as it is, and why proponents of the amendment should seek to inject into the public school condition by amendment a trace of religion, which might then take on the negative feelings that many kids have about public school, I do not see, and I do not see it as doing any great boon for religion.

The CHAIRMAN. Dean Redlich?

Dean REDLICH. Senator, I did cover that, and I will reemphasize it. A moment which is set aside for silence or prayer and is officially designed, and as such will, in my judgment, encourage children to engage in silent prayer.

If one is a member of a majority religious faith, that appears to be innocuous. There are many religious faiths that believe that one does not pray in public. There are many religious faiths that believe one does not pray with members of another religion. And, therefore, people holding that faith—and many members of my own faith hold that faith—will be forced by virtue of their own religious belief to remain completely silent, not to move one's lips, and to make it clear that they are not engaging in prayer.

You have to be a member of a minority religion to appreciate what that means. And as I said before, I do not want to be a stranger in my own home. I do not want my grandchildren to be strangers in their own home, either. This is our religious home. It is a home which has maximum religious diversity, freedom, and harmony because of a constitutional principle embodied in the language, "Congress shall make no law respecting an establishment of religion." And I read the history very different from the way you have read it and the way Mr. Malbin has read it and the way Mr. Parker has read it.

The word "establishment" was used time and time again in James Madison's "Remonstrance Against Religious Assessments," and if one reads that document, you cannot conclude that the word "establishment" means only the creation of a national church. It means Government conduct in support of religion. I think the framers knew that religious freedom was going to be maintained by making sure that Government does not endorse religion. Individual children are perfectly free to pray, but it should not be in the context where Government is endorsing the practice of religion.

The CHAIRMAN. We went for 175 years—I wonder if we made errors all those years when we allowed prayer?

Reverend KELLEY. Mr. Chairman, the history of litigation over devotional practices in public schools is voluminous. There was a young Catholic boy named Tom Wall in Massachusetts who would not, because of the advice of his parents and his priest, participate in the devotional practices in public schools. So, the teacher took a long rattan stick and beat him over the knuckles until he changed

his mind. That is not alone in the instances of controversy that have occurred over more than a century over such issues.

So, to say that they do not hurt anyone is completely to disregard the history.

Senator HATCH. Well, Dean Kelley, I do not think anybody for or against school prayer would countenance that—my gosh.

Reverend KELLEY. No; but when people——

Senator HATCH. What you are saying is that people can sometimes extend it.

Reverend KELLEY. When people speak as though all had been sweetness and light——

The CHAIRMAN. Mr. Chairman, I am going to have to go. Thank you very much, and I thank you gentlemen for responding to the questions.

Senator HATCH. Well, thank you, Mr. Chairman.

Dr. Malbin, perhaps you would like to respond also to Senator Thurmond's question.

Dr. MALBIN. Yes; thank you. If I may begin with Dean Redlich's observation, and to be a little personal about it, I was one of two Jews in my high school where the students were asked to begin the day with a prayer. And I experienced everything that the child you described experienced. It was a situation in which people pressured other people. They started fist fights with other people. It was an ugly situation, and it was the most innocuous prayer that has ever been used in a public school situation; it was the New York State Regents Prayer.

It has been an experience that has colored my every thought about vocal prayer for the last 30 some-odd years.

But I would like to point out what is going on in the example, peer pressure can only be based on one person observing someone else. People cannot get inside other people's heads. In the example we had a student who chose to read to protest what was required: silence or standing still. It was not required for that student to think anything or do anything while standing still. In fact, one would assume that one would be told not to do anything, or I would at least hope so—I would hope the legislative history would say that overt symbols of religious display would not be part of what goes on.

In fact, Dean Redlich and I share a religion in which there are numerous—precisely for this reason—observable practices and rituals for every moment of the day. We have nothing that remotely resembles what in other religions is a credo or a catechism. We do not try to get inside each other's heads. Now, I think that is terribly important we do not try to penetrate each other's thoughts. I do not see the danger in a moment of silence, therefore, that he does. But I do see a situation in which one has to be terribly, terribly sensitive.

By the way, as a matter of history, I just simply disagree with the statement that was made about what Madison meant and what the establishment clause meant. There is too much historical evidence on that point. There were protestations in the Congress over and over again, "We do not mean to hurt religion." What was meant is we will not prefer one religion or groups of religions over another; that we will not do anything that would tend to prefer one

religion over another even if it does not establish a state church or anything like that.

Conditions have changed. When the conditions change, the old principles sometimes may have to lead to a reassessment of practice, so that practice that might have seemed inoffensive in the past, such as a public prayer, in fact turns out not to be consistent with the principles, because the religious communities have changed. But if the old principles themselves are not kept, then you do have a situation where judges are making law without amendment. Finally, in judging the new conditions while using the old principles, I am terribly uncomfortable with some of the practices that the witness on my side of the moment of silence issue would endorse. Invoking the name of Christ at an athletic event, I think, would raise all of the problems that I have been talking about.

It is true—I agree—that the issue is precisely as Dean Redlich has said, whether Government can endorse religion. That is in a way the issue. An endorsement is not intended, to promote religion, to be for the good of religion. I think the phrase of Roger Williams is absolutely correct: "the wall of separation" was meant to separate the garden from the wilderness for the sake of protecting the garden, for the sake of protecting religion. True enough. A moment of silence is not going to help religion. The question is whether for public reasons, for public purposes, we consider it useful to endorse a moment in which people can be there by themselves to think or reflect or pray quietly by themselves, and that is a public decision taken, as I say, for public reasons.

Senator HATCH. Let me just ask a couple of legal questions. Assuming that it is fair to characterize the *Jaffree* case as standing for the proposition that some moment of silence statutes may be constitutional even though all silent prayer statutes are unconstitutional, what kind of guidance does the *Jaffree* case really offer States and localities in determining what specific moments of silence statutes will be upheld?

Let's start with you, Professor Malbin.

Dr. MALBIN. I stated in the written testimony I think it offers no guidance at all. I think the point is that no matter what the words of the statute, courts will have to look into legislative intention. There is simply no way of knowing whether using the word "prayer" or not using the word "prayer" will save a statute.

I disagree with statements made earlier that a moment of silent meditation without using any other words is automatically OK under the statute. In fact, it was stated very clearly that if the legislative intention of a moment of silent meditation was to promote religion, that it could not stand.

Senator HATCH. Dean Kelley.

Reverend KELLEY. I will pass.

Senator HATCH. Dean Redlich.

Dean REDLICH. I think the majority of the Court has made it quite clear that the question is going to turn on whether the intention was to endorse religion.

Now, it has been said that this is a very difficult problem, that it will involve endless litigation. I would remind this committee, as it well knows, that courts have been dealing with questions of legisla-

tive intent and constitutional matters for a long time. We are constantly dealing with that issue when we are dealing with purportedly neutral statutes where the claim is made that the intent was racially discriminatory. And certainly, this committee has dealt with that issue in the Voting Rights Act.

Courts have been able to deal with that, litigators have been able to deal with it. A pure moment of silence statute, which is really intended to give people the opportunity to reflect, to think about the day, to gather one's thoughts together, is constitutional.

Senator HATCH. I think there is no question the courts will have to deal with it, but the question is they are going to have to deal with it on a case-by-case basis, aren't they?

Dean REDLICH. I think they will have to deal with it on a case-by-case basis the same way they deal with claims of intentional discrimination on a case-by-case basis.

Senator HATCH. Surely.

Mr. Parker.

Mr. PARKER. Senator, the Court has erected an insurmountable barrier to moment of silence legislation by utilizing a test which always provides a negative result. By concentrating on motive, there is no way in my view that a State can include the word "prayer" in a moment of silence legislation, without the Court jumping on it and saying there is an improper motive to endorse or advance religion or to accommodate religion which, under its new strict neutrality position, would be unconstitutional.

Senator HATCH. I see. I do not really understand the significance of the Supreme Court of the United States upholding the right of a school district to enforce a moment of silence by its students, or for that matter, extended periods of silence. Isn't that merely a function really of the position of authority that the school bears to the student, or in particular, I would like to just ask Reverend Kelley and Dean Redlich why this is a particularly important exercise in constitutional jurisprudence, what the Court decided there.

Dean REDLICH. I think the Court was making clear, at least the majority and the two concurring opinions, that not all moment of silence statutes are unconstitutional.

We also do not know—and Justice O'Connor dealt with this, I believe, in a footnote—footnote 5 in her concurring opinion—implied that a moment of silence statute in which an option was prayer could in her view be constitutional, and the question would turn on whether the intent was, as it was in Alabama, so the Court held, to promote religion, to endorse religion. And I think it has to be decided on a case-by-case basis.

But Senator, let us pose the alternative. We have a situation in which it is not easy to read the majority of the Court on the question of moment of silence and moment of silence for prayer. A choice of a response to that is to allow case-by-case litigation. Another choice of response to it is the amendment which is before this committee.

I would submit that for the first time in the history of this country, to amend the Bill of Rights on that issue, when that issue can be litigated in the courts, is an inappropriate response.

Senator HATCH. And some feel that is the only response. I think you have answered this question, but let me just ask it again.

Would it be each of your judgment, then, that a constitutional amendment such as Senate Joint Resolution 2, permitting voluntary silent prayer or reflection—or, voluntary silent prayer, in this case—would be necessary after *Jaffree* if a State desired to enact a silent prayer statute. Would such an amendment merely alter or merely clarify present law?

Let's start with you again, Dean Redlich, and then ask Professor Malbin.

Dean REDLICH. If the record before the State was the same as the record before this committee—and I commend you, Senator Hatch, because you have been quite forthright in indicating what the intent of this amendment would be——

Senator HATCH. There is no question in my mind.

Dean REDLICH [continuing]. If the intent of the State legislature was the same as that which is behind this amendment, then in my view, under *Wallace* v. *Jaffree*, that legislation would be unconstitutional.

Senator HATCH. Do you agree, Professor Malbin.

Dr. MALBIN. I am not going to speak as a lawyer. I am not a lawyer. I would say that there is no rule of law in this case; that the rule of law, as far as I can tell, is whether you judge neutrality by what you take to be the status quo. Do you take the status quo to be the statute with the word "prayer" as opposed to the same statute without the word, or do you look at a statute that has a long list of options which, taken together, seem to be neutral? In the one case, you say it is neutral, in the other case, you say it is not neutral. The intent—of course the intent of using the word "prayer" is to mention the word "prayer"—even if the intent of the overall statute is to be neutral. One can always find that intent. You do not use the word "prayer" unless you mean to mention it.

Therefore, I suppose it would be found unconstitutional. But that is not a lawyer speaking.

Senator HATCH. Mr. Parker.

Mr. PARKER. Senator, the decision of the majority in *Jaffree* is so far-reaching that it comes to the ridiculous end that a teacher, as a public school official, in essence, cannot even instruct their students that prayer is a permissible use of a moment of silence. That is why the constitutional route would have to be taken rather than the legislative route, if you are going to use the word "prayer."

Senator HATCH. I think what you seem to be saying is it would have been better for the Court to just say "No" and make it clear, rather than writing—I cannot remember how many pages there were in that decision—weren't there about 66 pages——

Reverend KELLEY. Eighty-one.

Senator HATCH. Eighty-one pages. I have never been a page-counter, but I know that it was a pretty exhaustive decision.

Dean REDLICH. Senator, there are some 25 moment of silence States.

Senator HATCH. Right.

Dean REDLICH. I am not prepared to say that all of those moment of silence statutes are unconstitutional.

Senator HATCH. Well, neither was Justice O'Connor.

Dean REDLICH. That is right.

Senator HATCH. I do not think anybody is prepared to say that. You are not, Professor Malbin.

How about you, Dean Kelley?

Reverend KELLEY. I am not a lawyer, either, and therefore, perhaps it seems over-simple to me. But as I——

Senator HATCH. Well, you see, you may be thinking better than anybody, not being a lawyer.

Reverend KELLEY. As I read the majority opinion and the two concurrences, it seemed to me quite clear that they were saying that what was absent was a clear secular purpose. Now, what a secular purpose might be to pass muster might be a little different, a little more difficult, but it seemed to me that the State had not even, according to Justice Powell, attempted to state a clear secular purpose.

So I think that offers a little clearer guidance than just leaving it entirely in ambiguity.

Senator HATCH. I have a number of other questions here, but I want to provide for my colleague some opportunity to make any statement or ask any questions he would care to.

Senator GRASSLEY. Mr. Chairman, instead of reading an opening statement, I want to insert it in the record.

Senator HATCH. Without objection.

[Statement follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman, I want to thank you for holding this hearing today on the significant issue of prayer in public schools. I would also like to welcome all of our distinguished witnesses. It is a pleasure to have the benefit of their views on this critical subject that is of great interest to all Americans.

I hope that through these hearings, we can shed some light on the meaning and intent behind the establishment clause, and its relevence in today's pluralistic society.

We must find a way to balance the interests and needs of all our Nation's people without the Government supporting any particular religion, nor being antagonistic toward religion in general.

I look forward to hearing today's testimony as we attempt to resolve this difficult issue.

Senator GRASSLEY. I would like to say publicly that I am going to be working for the adoption of a constitutional amendment that would express the point of view of the Congress and of our Government, that prayer in the public schools is constitutional.

I would like to ask my question of Dr. Malbin. You are against, as I understand it, a vocal prayer constitutional amendment, and for a silent prayer constitutional amendment. How do you respond to the point of view that has been expressed here, that even a silent prayer amendment is discriminatory to minorities?

Dr. MALBIN. I think that if a State says, "We will now have a moment for standing silently; in that moment, think what thoughts you will—pray, reflect, or be blank. But don't do anything. The crucial thing is that we are not to have demonstrations of behavior"—then there is no way of telling anybody from anybody else. You do not know who is a majority and who is a minority. You do not know who is thinking what or doing what. The crucial thing is that there must not be and should not be any encour-

agement of anything that is observable, so you can pick and choose who is who.

Senator GRASSLEY. Based on that comment, I would appreciate hearing your reactions.

Dean REDLICH. I think Professor Malbin is reaching for a result which is not there. The moment of silence or prayer, if it is specifically designated by the State for that purpose—and again, Senator, my last response to Senator Hatch was that given a legislative history as this legislative history is, which is to promote prayer in the school through a silent prayer amendment—it is simply not true that a moment of silence for silence or prayer leaves everyone free to do nothing.

A person who believes as a matter of religious faith that you do not engage in prayer in public is going to be compelled as a matter of his or her religious faith to demonstrate that fact so that his or her God will realize that he or she is not violating the religious faith that he or she believes in. That child may well choose to do exactly what the Jewish child did in the case that I recited to you. There will be others who may feel that it is blasphemous to be present when others of a different faith are praying, and they will feel compelled to get up and leave the room.

We have learned that there is simply no way to achieve equality in religious treatment through the device of Government endorsement of religion, because we are dealing with the most purely personal matters of individual faith, and just as there is no such thing as a nondenominational prayer, there is no such thing as a nondenominational moment of silent prayer, no matter how hard we may try to get there.

Senator GRASSLEY. Mr. Kelley.

Reverend KELLEY. Mr. Chairman, Professor Malbin's suggestion is one the motive for which I can sympathize with deeply. But it points out, I think, for me the infirmity of the moment of silence proposal, because it would in effect put a straightjacket upon what may take place in that moment, and thereby perhaps inhibit the free exercise of religion, if you will, of some children, like Catholic children, who feel that in order to pray properly, they must cross themselves. Well, that is an overt behavior which thereby sets them apart from others, but is essential to their understanding of how prayer is properly carried on.

Senator HATCH. How does that hurt anybody, Dean Kelley?

Reverend KELLEY. I don't say it hurts anyone, though it does make distinctions within the classroom that can lead to hurt in just the way that has been described.

Senator HATCH. Well, I am not sure of that.

For instance, Dean Redlich—I do not mean to interrupt, but I think it might be important——

Senator GRASSLEY. You are supplementing my point.

Senator HATCH. Yes. Dean Redlich, is it not a positive educational experience for a minority religion student to understand that there may be people from a majority religious standpoint who differ from him, that a majority of his or her peers and colleagues are of a different religious faith. I do not see how that is going to cause any nature of harm, any more than it caused Professor

Malbin harm, even though it was an innocuous vocal prayer, and even though he would prefer not to have vocal prayer.

Dean REDLICH. Shakespeare said it well, sir: "He jests at scars that never felt a wound."

Senator HATCH. But sometimes those scars that we get through experiences in life are what make a great dean of the New York Law School.

Dean REDLICH. New York University.

Senator HATCH. Sometimes those scars we get through life really are not scars; they are learning experiences that help us to have a more diverse viewpoint and outlook on life. They may be growth experiences that would help us to appreciate majority points of view, regardless of whether we agree or disagree. And it is really hard for me to see how a moment of silence or reflection is going to be punitive or discriminatory or difficult, or even hard to take by anybody in that category. You know, I have difficulty, even if a student, feeling that he or she could not be in the same room with some people who may be praying—they may not be; they may be reflecting—I do not see where it is really that discriminatory if they have to get up and go to other accommodations. Now, some do, and I have to admit there is room for both points of view. But I am not sure that the purpose of schools, or the purpose of government, is to protect everybody in life from any confrontation with religion, and that is why it is a little bit shocking to me—not shocking, because I have known your position for a long time—but it is a little bit surprising to me that a number of religions—I think, a minority in this country; you have cited some of them—feel contrary to even—and I can understand, and I thought that there was a legitimate argument even though I disagreed with it, on the vocal prayer amendment—but it is almost impossible for me to understand how a moment of silent prayer or reflection is such a heinous practice and such an unconstitutional practice or such a practice that is going to be so detrimental to a religion that, as a policy question, Members of Congress should decide against having a moment of reflection or silent prayer.

To me, I think it smacks of medieval scholasticism, which is that we have got to make sure that every little "i" is dotted and every "t" is crossed, and that we have to be absolutely correct on how many angels dance on the head of a pin. To me, that is the way I feel about it. But on the other hand, that is what makes these constitutional debates great debates, or at least important debates.

I am sorry, Senator.

Senator GRASSLEY. That is all right.

Mr. PARKER. Senator, if I could make a comment on your statement.

Senator HATCH. Yes, Mr. Parker.

Mr. PARKER. Pluralism has grown in this country. We are a country of many diverse religions with diverse practices. There are religions who take their Sabbath on Saturdays, such as the Seventh Day Adventists or Orthodox Judaism. There are others, of course, which take it on Sunday. That will inevitably lead to questions between children such as that which Dean Redlich shared with us earlier. Children will be children. They will question why

members of certain faiths took certain religious holidays when the school was requiring mandatory attendance.

There is no way that we can prohibit children from asking the type questions as that which was discussed by the Dean, other than just by a grossly unconstitutional law, prohibiting them to talk to each other about such things. Children will be children, and inevitably, we will have these type questions. And it is really not the role of Government to step in and try to prevent that.

Dean REDLICH. Senator——.

Senator HATCH. Yes, Dean Redlich.

Dean REDLICH [continuing]. I am not asking Government to step in. It is the proposers of this amendment that are asking Government to step in.

Senator HATCH. No, no. Dean Redlich, what I am asking is to end the governmental prohibition against recognition of religion or school prayer in public schools. I think that is the issue. It is not the form of prayer. It is merely a matter of—of course, you and I differ on the history of it—but returning to the 175 years when prayer in public schools was not a heinous offense. Now, I respect your viewpoint, as you know, and I have great respect for you personally.

Let me just shift a little bit——

Dr. MALBIN. Senator, could I just make one correction of the record?

Senator HATCH. Yes, Dr. Malbin.

Dr. MALBIN. It is off the point of silent prayer, but if I may, I did not say I was not harmed by the situation in the school with vocal prayer. The fact is, I was, because I was a lousy fighter, and I refused to step away from a fight. But there, what was going on was the students felt the State was on their side.

Senator HATCH. Well, one thing I am prepared to say is that any one of those statutes that used the word "prayer" in the 25 States that Justice O'Connor mentioned in her footnote, or were motivated by a desire to promote prayer—if they actually used the word "prayer" or were motivated by the desire to promote prayer, I think I can state categorically, having read that opinion, that those statutes would be unconstitutional under this decision.

Do you disagree with that?

Everybody is shaking their heads that you do not disagree with that. Is there anybody who does disagree with that?

Dean REDLICH. I am not as sure as you are. The majority opinion, or Justice Stevens' opinion, as I recall did not specifically address the question.

I think Dean Kelley put it very well. The Court said that they found no secular purpose in the Alabama statute. I am simply not prepared at this point to conclude that one can find no secular purpose in any of those 25 statutes.

Senator HATCH. Professor Malbin, you indicated that the vocal prayer, as innocuous as it was, the Regents Prayer in New York, was a difficult one for you, because you are not a very good fighter, and it may have been, as Dean Redlich has mentioned it, a scarring experience for you because of your minority religious status in the schools.

Would you find that to be the same case with a moment of silence or reflection—in other words, the constitutional amendment that we have proposed here in S.J. Res. 2?

Dr. MALBIN. I would not. I would have to say that the legislative history and the record probably ought to make it clear that such a thing should not be used as an excuse for all sorts of other demonstrations.

Senator HATCH. No—I agree with that, too. In other words, I will say right here, categorically, right here and now, as author of S.J. Res. 2, which I felt was the appropriate amendment we should have brought to the floor last year, but I felt like the administration certainly made it possible to debate the issue, and they should have the amendment they desired, and I supported that amendment also, and frankly, led the fight on the floor for it. But I will say right here and now that, personally, I have difficulty seeing how anybody could have real difficulties with S.J. Res. 2, but I will say that S.J. Res. 2 does not permit, and actually, in my opinion, would prohibit, outward manifestations of religious belief—or, should I say, vocal manifestations of religious belief. I just do not think there is any question about that. But it does not prohibit the right of a person or a schoolchild to bow his or her head, or a school district to choose to allow that particular moment of silence. It does not prohibit the right of the person to bow his or her head with regard to not praying and just with regard to reflecting. It does not prohibit that. It does not prohibit the right of a schoolchild to fall asleep during that moment of silence.

So, all I am saying is that my purpose is to end the debate. My purpose of having this amendment is to end the formal Federal Government prohibition—or, should I say the Supreme Court prohibition—against voluntary school prayer, and to provide in law that it is permissible, and I hesitate to see how anybody can believe that that is going to leave permanent scarring that is permanently disabling on any child or any school district or any parent, or anybody, for that matter.

Dean REDLICH. Senator, there is no prohibition against voluntary school prayer.

Senator HATCH. There is prohibition against any from of recognition of prayer.

Dean REDLICH. There is a prohibition against Government endorsement of prayer. There is no prohibition—no, no, no prohibition—against voluntary school prayer.

Senator HATCH. You are aware of the prohibition against formal recognition of school prayer. You acknowleged that, and shook your head yes.

Dean REDLICH. Any schoolchild is free voluntarily to engage in prayer. There is no constitutional prohibition against it.

Senator HATCH. But I find that that is a sophist argument, because—now, let me make my point. The first thing that came out of the mouths of the opponents of school prayer last time was, "Anybody can pray any time they want to," can silently pray. Well, that is a given. Who disputes that or differs from that? There is just no problem. But they cannot do it in public schools as a recognition by the State that prayer is an efficacious thing.

Now, on the other hand, you brought up what you called secular humanism. Those who are in the field of philosophy would describe that as a nontheistic form of expression, which is considered a religion by the Supreme Court of the United States in its writings, that pervades our school system. So, if we cannot have a theistic recognition of religion in the public schools, why do we have a nontheistic recognition of philosophical systems in our public schools that denigrate the belief in God?

You see, that is what is really involved here.

And Dean Redlich, what I am saying is that anybody can silently pray any time they want to, anyplace, anywhere in this land. But what I am saying is that they cannot do it in a structured environment under the laws that presently exist.

You would have to agree with that.

Dean REDLICH. If you are saying they cannot do it in a structured environment, encouraged by the State, that is correct——

Senator HATCH. That is right.

Dean REDLICH [continuing]. But they certainly are free to voluntarily pray in the public schools.

Senator HATCH. Well, I would just point out to you, my dear friend—and you know I am—that they can pray very silently in Siberia, but I do not think that that is a very good argument, in this great Judeo-Christian society, against Government permitting a period of silent prayer in public schools.

Dean REDLICH. Senator, I have to respond to that. I have said before this committee in prior testimony, the first thing any totalitarian society does is close the newspapers and close the churches——

Senator HATCH. I agree with that.

Dean REDLICH [continuing]. Because a totalitarian society cannot abide freedom of religion. My difference with you is because I firmly believe that freedom of religion is going to be advanced by Government staying out of religious affairs. It is not fair, it is not accurate, to suggest that my views are in any way parallel to a belief that religious freedom exists in a situation where someone can pray in a concentration camp. The fact is that those societies abolish churches. My position has nothing to do with abolishing churches. My position is one which is guaranteed to enforce the strength of churches by keeping Government away from them. That is the basis of my position. It is to encourage religion by keeping Government away from churches. It is what Supreme Court Justice Jackson asked whether we can believe, with a strength that is strong enough, so that what is rendered to God does not have to be decided and collected by Caesar?

Senator HATCH. Dr. Malbin, would you care to comment on this subject?

Dr. MALBIN. No; only that I think it is true that we have a right to pray at any moment, and I agree that the issue is whether a teacher can say, "Now is a moment that we are setting aside to make it easier." That is the issue.

Senator HATCH. That is the issue.

Dr. MALBIN. Yes; the issue is that.

Reverend KELLEY. I would like to correct the impression of scholasticism. I do not think that the moment of silent meditation or

prayer has nearly the perils or hazards to religious freedom of collective State-sponsored oral prayer.

Senator HATCH. I did not say that. I said the arguments against it do.

Reverend KELLEY. I think it is an attenuation, and it is for that very reason that I think it is almost absurd to be proposing to amend the Bill of Rights to bring about such a marginal sort of recognition of religion, which I feel is not a great boon, anyway, and the argument that the majority needs to have free exercise of religion, I think, was quite effectively countered by the Court, and particularly, I think, Justice O'Connor, in concurrence, to point out that the majority cannot use the machinery of the State to accomplish its free exercise of religion.

I think this remedy is not necessary when Congress has adopted the "equal access" proposal, that provides an opportunity in public schools for those students who wish, at their own initiative, to engage not only in prayer, but in religious discussion, et cetera, "on their own time," as it were, without State sponsorship.

If the Supreme Court next term holds that unconstitutional, well, then, maybe I will be a little more receptive to an amendment on that subject.

Senator HATCH. I am going to look forward to that day.

Professor Malbin, do you think that a moment of silence is an attenuation, or is as attenuated as Dean Kelley indicated?

Dr. MALBIN. No.

Senator HATCH. Excuse me. Silent prayer.

Dr. MALBIN. Is it an attenuation of——

Senator HATCH. Well, the way he expressed it.

Dr. MALBIN. Of one's——

Senator HATCH. Is attenuated prayer, I think.

Dr. MALBIN. I do not—I think that that is something that must be answered by every religion. I suppose some would say yes. I cannot honestly say that. In many religions, there is a moment provided for silent prayer that is meant to be an intense moment of individual communion; it is distinguished from the vocal section of the service which is meant to be a communal statement. Whether a silent moment feels more attenuated than a vocal one would vary on one's religious beliefs. It is nowhere near as attenuated as the kind of silly pablum that comes out from a commonly written vocal prayer.

In any case, the issue before Congress is not what best serves the religious needs of one or another sect, but what sort of public statement is appropriate for the political community to make. That is best answered, I think, by a moment of silence for prayer or reflection.

Senator HATCH. Mr. Parker.

Mr. PARKER. I wanted to make a comment first about the references that Dean Redlich made to totalitarianism. Richard John Neuhaus wrote a very insightful book, published last year, that dealt with this subject, "The Naked Public Square," and I have a quote from that on page 8 of my statement that I would like to ask you to read later. He makes a very strong persuasive case that once a government tries to sanitize the public square by removing any kind of religious, moral underpinnings for society, that that is

the prelude to totalitarianism. That is when that form of government will rush in to fill the vacuum created by such efforts.

Now, in regard to the silent prayer amendment itself, I again would focus on accommodation. It is a means of protecting a student's right to silent prayer by accommodating that with reasonable time and place provisions. Otherwise, the student is going to have to pretend that he is listening to a lecture in order to practice his constitutional right to pray that everyone here has recognized.

Senator HATCH. Just this morning, I read an article in The National Law Journal about a recent ruling by a U.S. district judge in Des Moines, IA, prohibiting prayers at public high school graduation exercises. Now, the judge found, as I recall, that the prayers would constitute a violation of the first amendment's establishment clause.

I presume, Dean Redlich, from your statement that you have made this morning that you may agree with the judge in that case?

Dean REDLICH. I would have to know the specific facts in the case. I have never felt that an invocation at a public ceremony, an invocation at a graduation, would be unconstitutional.

I think those are very different things from the kind of legislation we are talking about.

Senator HATCH. OK. I was going to ask you about that, because that is done quite often throughout the land.

Mr. FARKER. Senator, if I might add, there was a subsequent decision by Judge Benjamin F. Gibson of the Federal District Court of the Western District of Michigan, Southern Division, in the case *Stein* v. *Plainwell Community Schools* File No. K85–1997 CA decided May 22, 1985, in which he had Judge Vietor's decision from Des Moines in front of him, and he commented on it in a similar fact situation and found that there was no violation of the three-part lemon test in the voluntary prayer at a high school graduation service where attendance was not mandatory.

Senator HATCH. Ok. Again, I see that I have immersed myself in a great controversy. I did not have any illusions about it before we began. I do differ with a couple of you, but I respect your viewpoints. I think you know that.

We have had, I think, in this subcommittee probably the most controversial issues in the history of the country over the last 5 years that I have been chairman of this committee and even before that. Some people say, "Orrin, why do you want to be chairman of the Constitution Subcommittee, because it is so volatile, and all these issues are so difficult?"

Well, I think that is precisely why I do want to be chairman of this subcommittee. And one thing I have learned is that there is lots of room in this country for diverse points of view, and I want to make sure they continue. That is why I have always tried in holding hearings, regardless of whether it is the equal rights amendment, the balanced budget amendment, or school prayer, to get the best minds that we can get before the committee on both sides of the issue. And I do not think we have made any mistakes here today. We have had excellent people.

I am a great admirer of yours, Professor Malbin. Some of the comments you made in the vocal prayer context were among the most eloquent I have ever heard on this subject.

Dean Kelley, you are an old friend. We have known each other for quite a while.

And Dean Redlich, there are very few deans in this country that rise to the dignity, in my eyes, that you do. And even though I differ with your intensity against this amendment, and even though I differ with you on the amendment per se, I still think you have spoken very eloquently for your side on this matter today.

It really has been a privilege to have probably the person—outside of the litigants themselves—the closest to the *Jaffree* case, here with us today. We appreciate you coming, Mr. Parker, and giving your time to the committee, as well.

This has been a very interesting hearing, and I suspect that the debate on the floor—and I intend to have it—will be an interesting debate. I thought the one last year was an interesting debate. And the odds are always, I think, against those who bring constitutional amendments to the floor, and I do not think this will be any exception to that rule. But I do have a great belief that we will pass this amendment this year, not only on the floor of the Senate, but I believe if we can get it to the floor of the House—and we will probably have to discharge the Judiciary Committee to do so over there—if we can, I personally believe it will pass the House.

I am not sure, Dean Redlich, that in both of our intellectual arenas, that it would not be a very healthy exercise for this whole country to engage in, whether or not we are finally going to do something about at least the majority point of view on this particular issue throughout the country. I think it would be healthy for the country to have to consider this among other issues, and I intend to make sure it has the opportunity to do so, to the extent of my limited abilities to do it.

But again, I want to personally thank all four of you for being with us. It has been a real privilege to be here with you and to listen to you, and we will keep the record open for any additional statements or comments that you would care to put into the record. We will keep it open through the rest of this week, so if you can, we would appreciate it.

Thank you so much, and with that, we will recess this committee until further notice.

[Whereupon, at 11:45 a. m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL STATEMENTS AND VIEWS

Monroe Citizens for Public Education and Religious Liberty

MCPEARL

P.O. Box 10296
Rochester, NY 14610-0296

Martha Laties, Chairman
55 Dale Road East
Rochester, New York 14625
June 17, 1985

Senator Orrin G. Hatch, Chairman
Constitution Subcommittee
U.S. Senate Judiciary Committee
2245 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Senator Hatch,

Please enter this letter as testimony at the Subcommittee hearing scheduled for Wednesday, June 19, 1985, on the subject of proposed U.S. constitutional amendments to permit government-sponsored prayer services in public schools.

MCPEARL is a Monroe County, New York State, coalition working to keep public funds for public schools only and to oppose religious practices by public schools.

Please reject the following proposed legislation:

1) S.J. Res. 2, a joint resolution proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection, introduced by you on January 3, 1985 and referred to the Judiciary Committee;

2) S.J. Res. 3, a joint resolution proposing an amendment to the Constitution of the United States relating to voluntary school prayer, introduced by Senator Strom Thurmond on January 3, 1985, and referred to the Judiciary Committee;

3) Any proposed U.S. constitutional amendment to require or permit public school districts or their employees to sponsor or arrange prayer services for public school pupils, no matter whether the prayers are spoken or silent, no matter who chooses or composes the prayers, and no matter who leads them.

Any person may already pray silently at any time, and may pray aloud in any public school whenever the students are allowed to carry on private conversations, as at lunch or recess. Any teacher may already call for a period of silence in the classroom. No legislation is necessary to permit these activities.

Government and its agents have no business to designate a time and place for prayer, to endorse prayer, or to select the words and posture for prayer.

Each human being has the right to choose the time and place, words and posture for his or her own prayers.

Thank you.

Sincerely yours,

Martha Laties

Martha Laties

אגוד הרבנים המתקדמים
CENTRAL CONFERENCE OF AMERICAN RABBIS
21 EAST 40th STREET • NEW YORK, N.Y. 10016 • (212) 684-4990

Office of the Executive Vice President

June 18, 1985

Senator Orrin G. Hatch
224 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator:

I write to question the wisdom of your support of laws and constitutional amendments which would permit prayer and meditation in the public schools on any kind of an officially recognized and provided basis whatsoever.

Religion, and no matter how one masks it, this is religion, has no place in the public schools. Introduction of it is bound to be divisive and oppressive to minorities, thus depriving them of one of the most sacred treasures of the American heritage, a guarantee of full equality and a feeling of being thoroughly at home in their own country. All of the arguments which have been advanced by those who agree with you, to the effect that this will be completely "neutral and uncoerced" are unfortunately devoid of an understanding of human dynamics, about the consequences of which volumes have been written and I am sure read, however unsympathetically, by you.

Furthermore, the introduction of religious activity into the public school will have the effect, in all too many cases, of demeaning religion, of secularizing it. Religion belongs in the home and in a place of worship and, other than that, in the heart and soul on a purely voluntary and spontaneous basis, and is not to be coaxed, cajoled or coerced out of intimidated little children.

Complete and true freedom of religion means, among other things, freedom from the power of the State being employed in any way to establish religion or any manifestation thereof, however small. I urge you to uphold this basic tenet of American democracy and institional heritage. It is as American as the sand dunes on Cape Cod, and as fragile and delicate.

Shalom,

Joseph B. Glaser

Rabbi Joseph B. Glaser
Executive Vice President

JBG/s
cc: President Ronald W. Reagan
Members, Senate Judiciary Committee

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General Board of Church and Society
The United Methodist Church

June 19, 1985

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Dear Senator Hatch:

We understand that once again there is to be a Committee hearing in regards to proposed school prayer amendments to the Constitution. We believe this matter has been debated sufficiently. There is no need to spend more time on it. Please vote no on the various amendments that will be brought before the Judiciary Committee.

We obviously respect the power and importance of prayer and the role it plays in the lives of millions of people in this country and in our society. But we are writing to express our vigorous opposition to the proposed constitutional amendments, which would effectively return state-sponsored prayer, oral or silent, to America's public schools. No Supreme Court decision has ever removed God or religion from the public schools. The carefully drafted opinions by the Court on these matters do not keep a student from exercising his or her human and constitutional right to pray silently or orally at any time in the school day so long as that praying does not disrupt educational activities. They do not prohibit individuals from saying grace before lunch. They do not prevent study of religion as an important force in the development of American culture. However, they correctly hold that when the government directs or sponsors the time, content, or manner of student prayer, protection against "the establishment of religion" guaranteed by the First Amendment is violated.

We reject the idea that by not allowing government-sponsored prayer, the nation is expressing hostility toward prayer or religion. It is merely being vigorously neutral so as not to repeat the mistakes of the past where governments sought to make their citizens pray only in the form and to the God those governments deemed acceptable.

S.J. Res. 2, S.J. Res. 3 and S. 47 should be quickly voted down. All the arguments have already been made and the decisions made. There is no value in going through it again.

Sincerely yours,

George E. Ogle

Dr. George E. Ogle
Program Director
Dept. of Social and Economic Justice

GEO/blr

Rita Warren
P.O. Box 32408
Washington, DC 20007

Senator Orrin G. Hatch
Senate Judiciary Committee
Constitution Sub-Committee
135 Russell Office Building
Washington, DC 20510

June 19, 1985

Mr Chairman and members of this Committee: My name is Rita Warren. I am testifying in favor of Senate Joint Resolution 2. I have been instrumental in the passage of a similar law in the State of Massachusetts. Recently the U.S. Supreme Court ruled on the Alabama case regarding a moment of silent prayer or volunteer prayer in the public schools. However, the court decision did not outlaw a moment of silence that had been implemented in many other States.

Justice O'Connor stated in the Court's decision: "A moment-of-silence law that is clearly drafted and implemented so as to permit prayer, meditation and refelection within the presicribed period, without endorsing one alternative over the others, should pass this test...Moment-of-silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect."

In the case of School District of Abington Township v. Schempp, 374 U.S. 203, (1963), Justice Brennan in the concurring opinion said:

"It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation or the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between spheres of religion and government."

Last July, the House of Representatives voted 378 to 29 and 356 to 50 on legislation to prohibit a State or School District from denying individuals in public schools the opportunity to participate in a moment of silent prayer. I trust in the integrity of the House of Representatives and the Senate that Senate Resolution 2 will pass for the sake of our children, our Constitution, and America.

Thank you and God bless you.

Love, Prayer, Peace
Rita Warren.
Mrs. Rita Warren

March 14, 1984

CONGRESSIONAL RECORD

I just also want to say this: a funny thing happens around this place once in a while; somebody listens. Not often. Somebody was listening up there a while ago, Mr. President, and very kindly sent me down a book entitled "Mom, They Won't Let Us Pray" by Rita Warren. I must confess I never heard of Rita Warren and I never read the book. But I want to read the back of it to you:

BILL No. 4890 THE COMMONWEALTH OF MASSACHUSETTS

AN ACT ALLOWING FOR A MOMENT OF MEDITATION FOR SCHOOL PRAYER IN THE PUBLIC SCHOOLS

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period, silence shall be maintained and no activities engaged in.

This book says, and I believe it, "This bill became law in Massachusetts, and was upheld by a Federal court" and so forth. Now, frankly, there are some court decisions at odds with that one at a level below the U.S. Supreme Court, which has not ruled on it.

The point I want to make is this: The folks in Massachusetts are doing all right under this law. The folks in Illinois are doing all right under the law that we have there. I do not see anything in the constitutional amendment here offered by this Senator that does violence to any of the moving statements that my colleague from Connecticut has made. I only say this one thing: The greatest thing that has happened to this issue is to debate it as fully as we have. I think people will understand it better afterward, obviously, than they did before.

STATEMENT

of

THE AMERICAN JEWISH COMMITTEE

on Proposed Constitutional Amendments Concerning School Prayer

The beneficent teachings of religion have contributed immeasurably to human progress from barbarism to civilization. Our nation, in particular, settled in large measure by people who were yearning for freedom of conscience, having fled religious persecution, has been profoundly influenced by religious concepts. Every variety of denominational belief has flourished in this country, hand in hand with the American constitutional principle of separation of church and state, which has served as a bulwark of religious liberty. Religion has indeed flourished here with a vitality that is the envy of devout men and women the world over. The tradition of separation of religion and government, as guaranteed by the First Amendment, is surely one of the cornerstones of our freedom. It should be reinforced, not eroded or tampered with. Underlying the Establishment Clause of the First Amendment was the conviction on the part of the Founding Fathers that any union of government and religion inevitably would impair government and would degrade religion. Tax-supported, non-sectarian public schools have served as a unifying force in American life -- welcoming young people of every creed, seeking to afford equal educational opportunity to all, emphasizing our common heritage and serving as a training ground for community living in our pluralistic society. In 1962, the U.S. Supreme Court, in Engel v. Vitale, ruled that the recital of a state-composed ostensibly non-denominational prayer by public school children at the start of each school day violated the First Amendment. The following year, in Abington School District v. Schempp, the Court struck down a program in which passages from the Bible were required to be read and the Lord's Prayer recited. The rationale for these decisions is as compelling as ever. The Lord's Prayer, for example, is a Christian prayer. And no prayer, however neutral it may seem, can ever be truly non-denominational. In attempting to incorporate the tenets of several major religions, the meaning of prayer can only be diluted. It is simply not a proper function of our government to compose or to sponsor prayers for American children to recite. In the words of conservative libertarian columnist James J. Kilpatrick, writing in the Washington Post of December 10, 1981: "The state simply has no business in the religion business... The best solution is to leave a child's religious instruction where it belongs, in the home, in the church, in the temple, in his mind and heart."

It should be stressed, however, that there is nothing in the Supreme Court rulings in Engel v. Schempp (or for that matter, in the most recent ruling in Wallace v. Jaffree on June 4) which prevents any public school pupil from praying, either silently or aloud, whenever the spirit moves him or her to do so, provided only that the school program is not disrupted thereby. There are public school children today who engage in serious prayer during school hours (before examination, for example), and, to the best of our knowledge, nobody has ever interfered or denied their right to do so. It would seem, therefore, that there is no need whatever for any constitutional amendment to permit prayer, whether vocal or silent, in public schools.

It is important to note that the practices which would be permitted by any of the proposed amendments would not take place in a social vacuum. In hundreds of public school districts throughout the country, organized spoken prayer, Bible reading and religious proselytization are taking place today on a regular basis, in outright defiance of the Supreme Court decision in Schempp. Citizens who dare to challenge such practices frequently are threatened, insulted and ostracized, as are their children in the public schools. If a prayer amendment were to be adopted, these violations could be expected to proliferate.

One may wonder why there exists this apparent preoccupation with the need to intrude group prayer into our public schools. With some, it seems almost an obsession. If they wish their own children to pray in school, they can instruct them accordingly. On the other hand, if it is other people's children for whom they wish to prescribe prayer, their concern is surely presumptuous.

We do indeed face a crisis in public education. We all have a vital interest in upgrading the quality of the education now being received and experienced by American children, in the sciences and in mathematics in particular. But the controversy over prayer and meditation has nothing whatever to do with this. In fact, it is a "smokescreen" and a distraction from what ought to concern us all. If we are truly serious about what is going on--and what is not going on--in our public schools, what is urgently needed is to restore Federal funds that have been slashed from various educational assistance programs.

It is indeed the task of the public schools to reflect and to help inculcate the highest moral and ethical values of our society, as well as to develop character and responsible citizenship. But if this is the main concern of the sponsors of the proposed amendment, it must be said that permitting

organized prayer would hardly suffice to serve this purpose. What does belong in public schools, however, is the teaching of common core values--honesty, decency, compassion, patriotism, fairness, respect for the rights of others--that are broadly shared by people of all denominations and none. Nor is there anything in U.S. Supreme Court decisions to preclude such instruction, provided it is not couched in religious terms. These values can be taught far more effectively by adult example and by the day-to-day behavior of parents, school principals, administrators and teachers than by organized prayer, whether spoken or silent.

In sum, we believe not only that there is no need for any of the proposed amendments, but also that they carry within them the seeds of great potential for mischief. We question their wisdom. Clearly, they would amend the First Amendment, the centerpiece of the Bill of Rights, which has stood all Americans in good stead since its adoption in 1791 and which should remain inviolate. To paraphrase a current popular expression, it is not broke and does not need to be fixed. We urge, therefore, that no prayer amendments be adopted.

STATEMENT OF

THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Mr. Chairman and members of the sub-committee:

The Anti-Defamation League of B'nai B'rith opposes any constitutional amendment regarding school prayer. Since its inception in 1913, the Anti-Defamation League has been committed, as were our founding fathers, to protecting religious freedoms in this country, by maintaining the separation between church and state. It is this separation which promotes religious pluralism in our country by insuring neutrality toward and equal treatment of all religions. We have evidenced this continuing concern by our amicus curiae participation in such seminal Supreme Court cases as Abington v. Schempp, 374 U.S. 203 (1963), which disallowed as unconstitutional, Bible reading and prayer recitation in public schools and Lemon v. Kurtzman, 403 U.S. 602 (1971), which held unconstitutional state aid to private religious schools. We have also demonstrated our commitment to this principle in our testimony before Congress and state legislative committees.

The timing of these hearings is unmistakable. This committee is meeting a scant two weeks after the Supreme Court's decision in Wallace v. Jaffree, 53 U.S.L.W. 4665, Nos. 83-812, 83-929 (decided June 4, 1985), its aim is to achieve through constitutional amendment an overruling of the Supreme Court's recent decision barring organized prayer in the public schools conducted under the guise of moment of silence legislation. In conflict with the Jaffree decision and with the 1960's school religion cases the proposed constitutional amendments seek to allow what the Court hitherto has barred - - organized teacher-led group vocal or silent prayer in our public schools.

The Supreme Court has determined all organized religious group activities, whether vocal or silent, to be constitutionally impermissible in the public schools. Its reason has been that such organized activities held in the public schools threaten the religious freedom of the individual. It is this "individual freedom of conscience" which is the very foundation of the First Amendment. See Wallace v. Jaffree, 53 U.S.L.W. at 4669. This freedom in our country is rich and manifold, extending the Court has just recently reminded us, not only to varying deist beliefs but also to protect those without belief in God. There is a right "to select any religious faith or none at all." Id. This right, the Court held in Jaffree means nothing if it is not "the product of a free and voluntary choice." Id. It is the school child's free and voluntary choice which is in jeopardy today. For where organized prayer

activities are held in the schools, it is the individual child who loses his or her religious freedom to believe or not. This occurs because religious activity in the public schools invokes the "power, prestige and financial support of government." Engel v. Vitale, 370 U.S. 421. It is this "indirect coercive pressure upon religious minorities to conform," which diminishes individual religious freedom. Moreover, this individual free choice is threatened even by so-called "clean" moment of silence legislation. Such legislation often reflects the intent of bringing religious activities back into the public schools. Given this religious intent, it is no surprise that such activities -- bearing all the hallmarks of prayer including meeting at a prescribed time, with a teacher-leader -- stand as an invitation to abuse and often do result in state-sponsored prayer in the schools. In New Jersey, for example, such a "clean" statute with twenty years of legislative intent to return prayer to the schools has resulted in some schools implementing moments of silence by having teachers lead their students in classes bowing their heads in prayer in unison.

Any organized religious activities, whether vocal or silent, when carried on in the public schools involve several factors resulting in government coercion and pose a threat to individual religious freedom. These factors are: first, that the schools are run by the state and therefore when organized religious activities occur in the schools it suggests there is state approval of those religious activities. Second, compulsory attendance -- it is the state that forces the public school children to be in school and therefore it is the state that is gathering this audience for organized religious activities. Third, teacher supervision - - again, the teacher is the state employee who is the authority figure for the students. It is this state employee who takes the students through the school day and it is this same state employee that commences the day with his or her head bowed praying; this bespeaks government endorsement and has a very persuasive effect on the schoolchildren. Fourth, impressionability - - much has been said about the difference between public school children and adults by the Supreme Court in its many cases which have sustained religious activities in the university and in the state legislature that has not been sustained in the public schools. The special treatment of public school children recognizes that because of their youth and impressionability public school children regard organized religious activities in the schools as endorsed by government.

These factors of government coercion present when there are organized religious activities in public schools threaten each and every child's religious freedom. However, it is the religious freedom of the minority child which is most in jeopardy. For if there are organized prayers in our public schools, they are unlikely to be Buddhist or Jewish; instead they will no doubt be the prayers of the majority religion. The minority child will merely go along with the majority exercise, against his or her beliefs, in order not to stand out as a religious minority.

May our society grounded on diversity and pluralism afford this diminishment of individual religious freedom? It cannot; yet paradoxically proponents claim school prayer too is necessary for religious freedom. Still it is clear that in the absence of the schools as places for organized prayer activities, a person's freedom to practice his or her religion would not be diminished. Nothing stops individual students from praying out loud, or silently at any time in school. As to organized group worship, students attend school several hours a day, five days a week, nine months out of the year. All the remaining time is available to them for their participation in organized religious activities at any place other than the state-supported schools. See Abington v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J. concurring).

Last, organized prayer activities in the public schools not only raise difficult problems for individual religious freedom, but they undercut the very purpose of the public schools. For the public schools have always been deemed to be "a symbol of our democracy." McCollum v. Bd. of Education, 333 U.S. 203, 231, (1948). They exist to serve a public function and are a "means for promoting our common destiny." Id. This public function is served not by promoting divisive religious activities which separate believers from non-believers in our public schools, but rather by seeking out and reaffirming what is common among us.

TESTIMONY

of

John Buchanan

Chairman, People For The American Way

Mr. Chairman and Members of the Committee:

My name is John Buchanan and I am here today on behalf of People For The American Way, a non-profit, non-partisan, citizens' organization established to protect and promote constitutional rights and liberties, especially those contained in the First Amendment. I am pleased to appear today on behalf of PEOPLE FOR and its 150,000 members nationwide to present our views on the proposed constitutional amendments on school prayer which have been referred to this committee.

We are opposed to S.J. Res 2, which proposes an amendment to the Constitution relating to voluntary silent prayer or reflection, and to S.J. Res. 3, which proposes an amendment to the Constitution relating to voluntary school prayer, and to any other attempt to amend the First Amendment. However, we welcome the opportunity to participate in this debate. It is a sign of the health of this society that we can discuss the issues raised by these proposals.

The Supreme Court's recent decision in Wallace v. Jaffree upheld the principle of government neutrality with respect to religion, and restated the prohibition against Congressional intrusion in areas protected by the First Amendment. This decision provides a most instructive backdrop for these hearings on school prayer amendments, "keeping in mind", as Justice Stevens wrote for the majority, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." Notwithstanding the clamor for a school prayer constitutional amendment, we hope that these hearings will demonstrate why these amendments are unnecessary and potentially harmful to the

rights of American citizens. It would be most regrettable for this committee to be persuaded by the views of many in the religious right who, in the words of televangelist, Pat Robertson, believe that Wallace v. Jaffree is "an act of war against this nation's religious heritage." On the contrary, the Wallace v. Jaffree decision preserves America's religious heritage and our tradition of separation of church and state. Accordingly, the decision overruled a state law which, in the words of Justice Sandra Day O'Connor, had "intentionally crossed the line between creating a quiet moment during which those so inclined may pray and affirmatively endorsing the particular religious practice of prayer. This line may be a fine one, but our precedents and principles of religious liberty require that we draw it."

On this very day, students can, if they wish, voluntarily pray and read the Bible in public schools without violating the Constitution, as long as their exercise does not interfere with school activities or appear to be supervised by school authorities. School children have always been able to pray the way Jesus said in the Sermon on the Mount - in their hearts. That was true in my home state of Alabama before the legislature passed the law the Supreme Court just struck down.

In reality, the school prayer issue has already been addressed. In the Wallace v. Jaffree decision, the Court implied that the neutral moment of silence during which students can pray according to the dictates of their faiths and consciences - a practice enacted in 24 states - "should pass the Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect."

Moreover, in yet another development in student religious activities, the 98th Congress passed and the President signed the Equal Access Act which sought to respect both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment, and allows secondary school students to carry out activities, including religious activities, on school property, so long as they are student-initiated, not related to the school curriculum, and school authorities have no connection with them. PEOPLE FOR had strong reservations about the

Equal Access bill and opposed the original version in Congressional testimony. While the proposal was considerably modified before it was enacted into law, we did not believe this to be a legislative remedy that was necessary. However, the Equal Access Law, coupled with the Supreme Court's decision on the neutral moment of silence, would appear to provide more than adequate protection of the nature which school prayer proponents advocate.

Before considering additional school prayer proposals, such as those before the committee, it would seem only reasonable for school prayer proponents to allow the states the opportunity to react to the Wallace v. Jaffree decision which seems to accommodate and fosters a neutral moment of silence, and to observe the impact of the Equal Access Act.

The proposed school prayer amendments provide a simplistic solution to today's complex problems. The task of sustaining America's religious spirit is deeply individual and essentially private. It cannot be nurtured by government edict, government preparation of prayers, or by government intervention in the religious lives of children. This is what the writers of the First Amendment to the Constitution so wisely recognized so many years ago.

The First Amendment to the Constitution directs that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This language represents the delicate balance that is popularly known as the separation of church and state. The Constitution exists both to protect the right to prayer, and to protect those who do not wish to engage in prayer. Some forces which support the proposed constitutional school prayer amendments wish to take us back to the day when one person's religion would be imposed on another. We must never forget that our First Amendment guarantees were prompted by the religious persecution experienced by our forebears.

The dangers of tampering with the First Amendment and the protections it provides to all Americans are also illustrated in another legislative proposal, S.47, the Voluntary School Prayer Act of 1985, a bill to strip the Supreme Court of jurisdiction over cases involving

school prayer, Bible reading and religious meetings in public schools, an effort which would fundamentally alter the guarantees of individual rights and liberties contained in the Constitution and the Bill of Rights.

If enacted, court-stripping legislation will provide a radical challenge to the federal courts' historic role. Unlike the 2/3 vote of Congress required for a constitutional amendment and ratification by 3/4 of the states, court stripping could be accomplished by a simple congressional majority and presidential approval. This process would allow a bare majority to attempt to rewrite the Constitution.

Court-stripping legislation is also troubling because it shows a lack of respect for our government characterized by its separation of powers and system of checks and balances. Further, it reflects an ominous trend in the U.S. Congress - that of introducing a bill whenever one disagrees with a federal court decision.

In the Wallace v. Jaffree decision, the Supreme Court attempted to fashion a reasonable rule of government neutrality in matters of religion. Unfortunately, supporters of both the court-stripping approach and constitutional amendments relating to school prayers do not want government to be neutral. Theirs is a dangerous position.

It is also a dangerous notion that the federal courts have no jurisdiction over First Amendment matters because the Bill of Rights does not apply to the states. Wallace v. Jaffree was especially significant in that it reaffirmed a fundamental constitutional principle. The Bill of Rights applies to state and local government, as well as to the federal government. The state cannot remove the burdens imposed by the Constitution.

In Wallace v. Jaffree, Federal District Court Judge Brevard Hand held that the Constitution's Establishment Clause "does not prohibit the state from establishing a religion." According to this extreme view "the states were free to establish one Christian religion over another in the exercise of the prerogative to control the establishment of religions." The Eleventh Circuit reversed Judge Hand and rejected the "historical arguments" that had been advanced by New Right judicial

reformer, James McClellan of the Center for Judicial Studies, in his testimony before Judge Hand. As Supreme Court Justice Stevens wrote in the majority opinion commenting on the District Court's "remarkable conclusion" that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion: "...it is appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."

We at PEOPLE FOR hope that this committee will take no action to dilute the First Amendment, so hard won by our founders, so protective of our sacred rights and so much more important to the welfare of our children and of their children's children than government-sponsored prayers, silent or vocal, in school could ever be.

Religious instruction of children is the responsibility of parents and their churches and synagogues. It is neither the responsibility, nor the constitutional right of government, or the public schools. Protecting the rights of American citizens is the solemn responsibility of the courts and Congress.

People For The American Way urges this committee to stand by the Constitution, undiluted and unchanged, and, thus, to protect the rights of the American people.

S T A T E M E N T

OF

NATHAN Z. DERSHOWITZ

At A Hearing on S.J.Res. 2 and S.J.Res. 3

on behalf of the

NATIONAL COMMITTEE FOR
PUBLIC EDUCATION AND RELIGIOUS LIBERTY

On behalf of National PEARL we welcome this opportunity to testify concerning S.J. Res.2 and 3, proposed constitutional amendments to permit "group silent prayer" and "group prayer" in public schools and other public buildings. We urge you to reject this amendment.

The Committee on Public Education and Religious Liberty (PEARL) is an umbrella organization of organizations, all of which believe in the importance of public education and the need to keep public schools free of sectarianism.[1]

S.J. Res.2 and 3 would both amend the United States Constitution. S.J.Res.2 would add the following language:

> "Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection."

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[1]PEARL includes: American Association of School Administrators; American Civil Liberties Union; American Civil Liberties Union of the National Capital Area; American Ethical Union; American Federation of Teachers; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defammation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Connecticut Civil Liberties Union; MCPEARL - Monroe County, New York PEARL; Michigan Council About Parochiaid; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; Nassau-Suffolk PEARL; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Service Conference of the American Ethical Union; New York PEARL; New York State United Teachers; Ohio Association for Public Education and Religious Liberty; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; Union of American Hebrew Congregations; Unitarian Universalist Association.

S.J. Res.3 would add the following language:

> "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools."

The organizations joining in this statement urge rejection of these proposals.

We regard the principle of religious liberty and separation of church and state as fundamental to American society. As Justice Stevens wrote in his majority opinion in Wallace v. Jaffree, __ U.S. __ (June 4, 1985):

> "Just as the right to speak and right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among "religions" -- to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in Board of Education v. Barnette, 319 U.S. 624, 642 (1943):
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States must respect that basic truth.

We believe that any departure from that principle, embodied in the First Amendment, but which is far more than a mere legal rule, jeopardizes the political and religious freedom of which America is justly proud. We believe further that the American public school system, free and non-sectarian, is one of the most precious products of American democracy and a unique contribution to modern civilization, and feel ourselves impelled to express opposition whenever attempts are made to compromise its integrity.

Our opposition to the proposed amendment is based fundamentally on a deep commitment to religious values and to the principle that such values must be espoused freely as an act of individual conscience. To people of all faiths, the purpose of prayer is spiritual communion with God. The home, church and synagogue are the proper, time-honored places which provide the appropriate setting for communion with God. There, religious yearning and the needs of the soul can find satisfaction. Mechanical recitation of prayers in public schools degrades these true religious experiences. It is harmful to the cultivation of the religious spirit.

Supporters of these Amendments often erroneously complain that the Supreme Court's decisions have banned prayer from the public schools and thus deny students who wish to pray freedom of religion. According to a recent Gallup Poll, the single largest reason why Americans support amending the Constitution is because "people should have the opportunity to pray when they wish to." The perception that prayer is forbidden in the public schools is a distortion of applicable constitutional principles and what the Supreme Court -- and the lower courts -- have held.

As noted by Justice O'Connor in the beginning of her concurring opinion in Wallace v. Jaffree, supra: "Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during or after the school day."

All that is prohibited by the Constitution is officially sanctioned prayer. Purely private prayer, such as saying grace or the like, has always been permitted. We believe that, unless disruptive of school routine, such prayer is constitutionally protected. We are unaware of any instance in which school officials have attempted to prohibit such purely private prayer.

The Supreme Court decision in Wallace v. Jaffree reiterated the difference between legislation which injects prayer into the public schools and legislation which merely protects every student's "right to engage in voluntary prayer during an appropriate moment of silence during the school day." The difference between the two is not only of constitutional dimension but the principle underlying the constitutional mandate is sound.

Oliver Wendell Holmes once observed, "[w]e live b symbols, and what shall be symbolized by any image of sight depends upon the mind of him who sees it." Collected Papers, 270 (1920).

The S.J. Res.2 is directed toward children in public schools. The public schoolroom is the first opportunity most citizens have to experience the power of government. Because of our compulsory attendance laws, the public school building has become a symbol of government authority, and the teacher has become the embodiment of that authority. The typical school day is carefully structured and controlled. Student activities are closely supervised, and inappropriate conduct is subject to punishment. The implication for students is obvious: prayer is permitted to take place during the organized school day and enjoys the approval and support of the school administration. Those who do not follow the practice are, to quote Justice O'Connor, "outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. __ (19).

The Bill of Rights was added to the Constitution, in the now classic words of Justice Jackson:

> to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to ... freedom of worship ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Many of the Founders believed that a bill of rights was unnecessary because the rights protected by those amendments were natural rights, not subject to defeasance by government. That view fortunately did not prevail, and restrictions on the powers of majorities were written into our fundamental law.

The Bill of Rights, then, is a self-imposed limit on the power of majorities. Proponents of these amendments seem unwilling to acknowledge that there ought to be restrictions -- even self imposed ones -- on the rights of majorities to do as they please in the public schools. They seem to be saying "these are our schools. Since we are the majority, and this is a democracy we will do what we wish in those schools, although you may excuse yourself if you wish."

Surely, there can be tyrannies of a minority. And surely in a democracy minorities must ordinarily bow to the will of the majority. But until now we as a society have accepted the notion that amongst those areas where the minority need not submit to the rule of the majority is the non-establishment of religion. No compelling need has, or can, be shown to justify a change in that wise and beneficent policy which has served this country so well.

Religion does not need, and should not have, the sponsorship or support of government. More broadly, we insist that religious practice should never be made a matter of majority decision. The faith of Americans has been kept strong through the home and the church and synagogue. It will continue to be strong if it is kept free from government intermeddling.

STATEMENT OF ROBERT L. MADDOX, EXECUTIVE DIRECTOR OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Mr. Chairman and Members of the Committee:

My name is Robert L. Maddox. I am Executive Director of Americans United for Separation of Church and State. Americans United is a 38 year-old organization dedicated solely to the preservation of the religious liberty and church-state separation provisions of the First Amendment to the Constitution.

Through our membership, we represent individuals of conservative and liberal political persuasion as well as the full spectrum of religious faiths. We also have a substantial number of members who are not connected with religion in any way. What unites us in this diversity is our concern for religious freedom.

As an ordained Southern Baptist minister, I believe in the power of prayer. But I am alarmed at attempts in recent years by Congress to establish a proscribed time for prayer in public school during the school day. My Baptist heritage makes me very suspicious of any government intrusion into religion, or any attempt by government to promote religion in any way. History has shown time and time again that when government gets into the business of promoting religion, somebody's rights get stepped on.

Americans United opposes S. J. Res. 2, which states:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of silent prayer or reflection.

We oppose the amendment for many reasons.

First, it is unnecessary. It is constitutional now for a school to set aside a quiet time to bring a class to order, give students a time to collect their thoughts, pray, reflect, or do anything they choose. To put such activities into the United States Constitution as an amendment or even as a statute makes us question the real motivation behind such activities.

Second, the mere fact that a constitutional amendment mentions the word prayer gives the appearance of promoting some kind of religious observance.

Our concern is that a silent prayer amendment would encourage teachers and school officials to take license with such an amendment and institute religious activities during moments of silence or reflection. Why else would proponents want to go through such extraordinary efforts to pass a constitutional amendment? The opportunity to set up periods of quiet time already exists during the school day.

The only message this amendment would send to the American people is that government has finally sanctioned religious

exercises in public schools. In many areas of the country, religious groups will no doubt interpret the passage of this amendment to mean they can proselytize on school grounds.

Americans United supports and applauds the Supreme Court's recent decision in Wallace v. Jaffree, opposing an Alabama statute 16-1-20.1, "which authorized a period of silence 'for meditation or voluntary prayer.'"1

We do not believe that any amendment or statute that proposes silent prayer could have a secular purpose, which is the test the Court applied in the Jaffree case. It is clear to us that S. J. Res. 2 is not being considered for the utilitarian purpose of establishing the right of schools to have a moment of silence during which, incidentally, students may pray, reflect, or do anything else they choose -- quietly.

Third, it is quite obvious to us that S. J. Res. 2 is creating silent prayer or reflection sessions -- time set aside for expressly religious purposes. This the Court said was unconstitutional and this amendment, we believe, would be the start of further attempts to subvert the First Amendment guarantees of religious freedom.

Justice Stevens wrote in the opinion for the majority on the Court in regard to the Alabama statute 16-1-20.1, but which applies equally to S. J. Res. 2:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day.2

The purpose of S. J. Res. 2, we believe, is to return prayer to the public schools by encouraging school officials and teachers to extend religious exercises beyond merely silent prayer.

Supreme Court Justice Sandra Day O'Connor stated quite correctly that:

> The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.
>
> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent....3

S. J. Res. 2 would convey the message that religious exercises are appropriate and that silent prayer is the first step.

One of the problems with this amendment is the vagueness of the term "silent prayer." Many adults do not understand the concept of "silent prayer" or practice it, let alone children. In fact, some religions prohibit the practice of praying silently. Prayer for one child may involve bowing his head, kneeling, crossing himself, or even facing the East toward Mecca.

For others prayer means meditation. One dictionary defined the word meditation as a "devotional exercise of contemplation."

Meditation has the same intent as prayer. It has religious connotations that can be construed to include religious practices, such as Transcendental Meditation (TM), an offshoot of Hinduism. This was a concern raised by TV evangelist Pat Robertson in 1984, during the height of the debate in the Senate on the school prayer amendment, S. J. Res. 73.

Americans United won a suit in New Jersey in 1977 against the use of TM in public schools. The courts held that TM is a religion and, therefore, could not be incorporated into public school curricula.

One problem that has never been addressed by this Committee is one that might arise for teachers if they are asked to explain to students what silent prayer is. How do we resolve the problem for the teacher who does not feel comfortable in that role?

Furthermore, is the government going to issue, through the Department of Education, guidelines or regulations for teaching "silent prayer" in the public schools? Will it be forced to act as mediator if conflicts arise from these activities?

And what is probably the most significant aspect of this controversy is the fact there is no support for this amendment within the religious community. Testimony from past hearings has been given from a wide array of religions, including those who support vocal prayer, and opposition to silent prayer has been nearly unanimous.

Furthermore, with one exception, all of the major newspapers around the country have editorialized in support of the Supreme Court's decision against a moment for silent prayer. A collection of editorials is attached to our testimony.

Though there have been major historical battles over the school prayer issue during the past 23 years, the Congress, in its wisdom, has never passed a school prayer amendment. We hope it will continue in this tradition and that the full Judiciary Committee will not vote out S. J. Res. 2.

But our concerns are not limited to just S.J. Res. 2. We oppose all bills and amendments that propose any form of mandated school prayer, and in particular we want to comment on S. J. Res. 3, a vocal school prayer amendment proposed by Sen. Strom Thurmond.

That amendment states:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

By reintroducing this amendment, Sen. Thurmond has once again opened a 23 year-old controversy that began with the 1962 Supreme Court decision Engel v. Vitale, 370 U.S. 421 (1962). In that case, the Supreme Court ruled that it was unconstitutional for the New York Board of Regents to compose and prescribe a prayer which children in New York public schools were forced to recite every morning.

In the following year the Court said in the cases of Abington School District v. Schempp and Murray v. Curlett 374 U.S. 203 (1963) that a state may not require the Bible and the Lord's Prayer to be recited in public schools as part of the daily devotional exercise.

Justice O'Connor said in the Jaffree decision the simple fact that:

> Nothing in the United Sates Constitution as interpreted by this Court or in the laws of the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day.4

This no government agency, court, school board, or any public official could ever do. What the Court insured is that there be "true" voluntary prayer in public schools.

The question asked most frequently by proponents is, "What is wrong with a little school prayer?" It does not hurt anyone and it might help some children.

For children who are part of a religious majority, such a law would probably not harm them much for the short term. But for those in the religious minority, such a practice could be devastating. While a Baptist child might feel very comfortable saying prayers in a public school in Tennessee or North Carolina, he might feel very out of place and discriminated against in some New York City schools where he might be asked to recite a Jewish prayer, or in Massachusetts where he could be asked to recite a Catholic prayer, or in California, where he could be asked to chant as Hare Krishnas do in their worship.

The Encyclopedia of American Religions has listed more than 2,000 religions in the United States today. Who is to decide what prayers will be said in school? It would be an administrative nightmare for school board members to have to make the choice.

One of the primary reasons we oppose compulsory school prayer legislation is that children, by law, must attend school. They have no choice, therefore, to decide whether they want to be present for school prayer activities if they attend public schools. There is nothing voluntary about a school day routine. Any child forced to say a prayer at school would soon recognize that it was not a voluntary activity.

Some argue that children could absent themselves from the classroom during the prayer sessions if they did not want to participate. But this is one of the worst kinds of discrimination. It would be a truly unusual child who could withstand the disapprobation of his peers and teachers to excuse himself from prayer activities.

Others have contended that as long as the teacher does not lead the prayer session, or the prayer is not written out for the students or prescribed, then such activities are constitutional.

Whether the prayer is written or not, whether a teacher leads the prayer session or a student is chosen for that task, coercion of students to participate still exists. Peer pressure to conform and join in is still felt. And the activities would have the appearance of government sponsorship.

Communication with one's God is a very personal experience and one that should not be trivialized or used as a disciplinary action, such as quieting a classroom or creating a serious tone.

Children know when they need to pray. They do not need an official time set aside by the state for that purpose. And if they lack a religious education, it is not up to the government to fulfill that role.

Furthermore, there are few teachers who have the expertise to lead prayers or teach other religious exercises. And it is unfair for a teacher to be forced to lead a prayer or religious exercise in which he or she may not believe. While the teacher could be excused from participating in the activity by allowing a student to lead a prayer, this could be disruptive and divisive in a classroom where rival religious groups may vie for leadership and control. The best solution and the only one is to leave religion out of the classroom entirely as a devotional exercise.

What we would eventually see in the classroom would be watered down, homogenized and bureaucratized form of prayer that would be meaningless and routine to sincerely religious students. It would have no resemblance to genuine "voluntary " prayer.

Contrary to a well-orchestrated campaign of misinformation, references to God and religion have not been banned from public schools. The following list includes some activities upheld by our courts or national laws:

1. Schools may use the Bible or other religious books as resources in teaching about religion.

2. Schools may offer an elective course in the Bible as literature and history.

3. Schools may offer objective instruction in comparative religion.

4. Schools may study the history of religion and its role in the story of civilization.

5. Teachers are free to utilize such documents as the Declaration of Independence which contain references to God.

6. Students may voluntarily sing the national anthem and other patriotic songs which contain assertions of faith in God.

7. References to faith in God in connection with patriotic or ceremonial occasions are generally permissible if participation is voluntary.

8. Students may be released for religious instruction off school premises.

9. Students may read the Bible or other religious literature during their free time at school.

10. Students may pray voluntarily and silently any time they wish.

11. Students may also initiate religious activities on an equal basis with other non-religious student groups, as long as such meetings are totally student initiated, student sponsored, no school sponsorship or participation by teachers, and as long as meetings are held before the school day starts or after the school day ends, as long as long as there is no participation on a regular basis by outside groups or individuals, and as long as no school funds are used for these activities with the exception of a minimal amount needed for heating and lighting.

Government has no business involving itself in the religious affairs of children or anyone. Government's role toward religion has been and should continue to be one of neutrality. It should neither oppose religion, nor support it over others or favor nonreligion.

The challenge of education today is to teach our children secular subjects and prepare them for productive adult years. One of the challenges, indeed one of the privileges of parents, is to educate their children in the religious philosophy they choose, not that chosen by the government.

Government should leave the teaching of theology and the practice of it to theologians and parents. This basic precept of our Constitution is a revolutionary concept in the history of world governments, and is our proudest contribution to civilization. It is what has set this nation apart from any other in the world.

We ask the Judiciary Committee to oppose S. J. Res. 2, S. J. Res. 3, and any other amendment or bill that might come before it for consideration.

FOOTNOTES

[1] Wallace v. Jaffree, __ U.S.__, 53 U.S. L.W. 4665 (June 4, 1985) Affirmed.

[2] Id. at 1 (Stevens, J. concurring)

[3] Id. at 20 (Stevens, J. concurring)

[4] ID. at 1 (O'Connor, J. concurring)

26-A June 6, 1985

THE PLAIN DEALER

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EDITORIALS

Cracks in the 'wall of separation'

Ultimately, the question of school prayer revolves around the issue of restraint. Fundamentalists who seek to violate the separation of church and state (that is, more than it is already violated) clearly need to be restrained. Their agenda would not just establish God-in-the-classroom. Inevitably, it would lead to the establishment of religion-in-the-classroom.

Yet the degree to which the courts and the government should follow Thomas Jefferson's advocacy of a "wall of separation" also raises issues of restraint. Does that "wall" provide for accommodations? Should the courts restrain the nation's resurgent religiosity? Does the Constitution's Free Exercise clause restrain its Establishment clause? Perhaps it is the other way around.

The court didn't get that far in Wallace vs. Jaffree, in which a majority ruled against an Alabama law permitting a daily one-minute period for "silent meditation or prayer" in public schools. The court said that because the legislation's motive was religious in nature (a sponsor said the bill was designed to bring prayer back into the school) it failed to show "secular legislative purpose," the first of three prongs known as the *Lemon* test.

Under that precedent, the court indicates that it finds no merit in the imposition of what amounts to traditional prayer-time. Yet it indicates also that it will look favorably on related initiatives in other states that simply provide for one-minute periods of quiet—to be used for meditation or daydreaming or prayer as the student chooses.

The ruling is a marginal success for school-prayer opponents. It restrains religious activity in the schools, as it should. Yet it also accommodates a desire to make public schools a venue for spiritual faith. As a compromise, it is not a bad one, even though the fine lines being drawn by the Supreme Court in matters such as this threaten to violate the third prong of the *Lemon* test, which cautions against "excessive government entanglements with religion."

And still, it avoids the question of whether religion is something to be incorporated—in any form—into the daily regimen of public schools. Given that religious conviction is private, there is no reason why its maintenance should be public. Inasmuch as prayer (or meditation or daydreaming) also is private, there is no reason why the schools should set aside time for such activity. Children should not—children *can* not—be restrained from praying at any time they wish.

Children should, however, be restrained from thinking that their faith is sanctioned by government. Structuring a time of repose (is that possible to do in a room containing 30 8-year-olds?) is not going to fool any child for long. It will be seen for what it is, a specific effort by the schools to indulge spiritual faith. To grade schoolers already sensitive to peer pressures and the insinuated preferences of authority figures, that amounts to establishment. Rather than the niceties of compromise and accommodation, it is that constitutional violation that requires restraint.

NEWSDAY, June 7, 1985

Looking Behind a Silent Moment in the Classroom

In striking down Alabama's moment-of-silence law this week, the U.S. Supreme Court spoke forcefully and unambiguously. By a 6-3 vote, the justices made plainer than ever the court's position that promoting religion in public schools violates the constitutional separation of church and state.

Alabama legislators had made no secret of their purpose in enacting the 1981 law: It was an attempt to bring religion into the classroom. By permitting the school day to begin with silent moments for "meditation or voluntary prayer," the state intended to characterize prayer as a favored practice.

That's obviously not consistent with the principle that government must pursue a course of complete neutrality toward religion. As Associate Justice John Paul Stevens wrote for the majority, freedom of conscience entails the right to select any religious faith or none at all.

But Stevens and other justices, in separate concurring and dissenting opinions, indicated that they might uphold moments of silence in future cases as long as state legislatures didn't intend to encourage school prayer. New York and 24 other states have moment-of-silence statutes. Federal courts have struck them down in New Jersey, Tennessee and New Mexico.

Justice Lewis F. Powell Jr. wrote that he would have upheld the Alabama statute if it identified any "clear secular purpose." Justice Sandra Day O'Connor held that silence, unlike prayer or Bible reading, wasn't necessarily associated with a religious exercise; she found it "difficult to discern a serious threat to religious liberty from a roomful of silent, thoughtful schoolchildren."

It's not at all clear what "clear secular purpose" is served when a state mandates a moment of silence for its schoolchildren. Teachers don't need legislation to call for order or to get their pupils' attention. For that matter, children don't need laws to spend a quiet moment individually saying a prayer or just thinking things over. That's neither the state's business nor the school's.

Chicago Sun-Times

Rupert Murdoch, Chairman — Robert E. Page, President and Publisher
Frank Devine, Editor
Kenneth D. Towers, Managing Editor — R. K. Gaur, Editor of the Editorial Pages

June 6, 1985

'Wall of separation'

Despite signs in recent years that the U.S. Supreme Court was relaxing its stress on absolute separation of church and state, the court in an Alabama school-prayer case has reaffirmed the traditional approach. It invalidated a state law that provided a daily one-minute period of silence in the schools for meditation or prayer.

In disposing of this case, the court charted a course through perilous depths and landed on the side of caution. Three justices filed vigorous dissents.

It must be emphasized that the court didn't ban prayer in the schools as such, as many secularists would want it to; it did ban legislative designation of prayer as an option for how the minute of silence could be used. The Alabama statute specifically mentions "voluntary prayer" as one option.

A six-member court majority said this rendered the statute unconstitutional, while similar statutes in other states that omit any reference to prayer might be constitutional. (An Illinois statute contains the same type of wording as the Alabama law and presumably was invalidated by the decision.)

Chief Justice Warren Burger, dissenting, attacked this line of reasoning. "To suggest that a moment-of-silence statute that includes the word 'prayer' endorses religion, while one that simply provided for a moment of silence does not, manifests not neutrality but hostility toward religion."

Justice Sandra O'Connor's concurring opinion touched on this point. She wrote, "Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer."

All of this no doubt impresses the public as pedantic hair-splitting. Surveys show the public overwhelmingly in favor of prayer in the classroom, and the Rev. Jerry Falwell, the Moral Majority evangelist, was correct in saying the latest court ruling ignored public opinion.

However, that is what the court is supposed to do in deciding any case—*ignore public opinion and apply the test of constitutionality without regard to popular passions.*

It stands to reason that sometimes the court will come on the side of public opinion, and sometimes against it, but never *because* of it.

A dissent by Justice William H. Rehnquist deserves special notice because of its startling departure from tradition. Rehnquist said the concept of a wall of separation between church and state "has proven all but useless as a guide to sound constitutional adjudication. It should be frankly and explicity abandoned."

That is radicalism, not conservatism.

It stakes a territory most of the public would prefer not traveling.

The wall-of-separation concept has worked well for two centuries. Recent Supreme Court opinions, such as one last year that upheld the constitutionality of a municipally owned nativity scene, demonstrate the elasticity of that concept.

As times and mores change, the concept can be re-interpreted, within limits, to accommodate new conditions. That does not mean the concept should be dumped. As its core, it remains a sound principle, one to which Americans strongly adhere.

The problem arises whenever fanatic secularists try to infuse the concept with more than what's there. Those who insist the words prayer and God should never be mentioned in a public school, anytime, anywhere, under any conditions, are zealots who endanger the concept far more than do those who support a moment of silence, or even voluntary prayer.

USA TODAY June 7, 1985

OPINION

The Debate: SCHOOL PRAYER

Today's debate includes our opinion that the Supreme Court was right to strike down an Alabama law that mandated prayer in the schools, opposing views from Virginia and Alabama, other views from Alabama and the District of Columbia, and voices from across the USA.

Advancing religion is not state's role

Most people in the USA want their children to pray in schools but controversy has swirled around the issue of school prayer since a 1962 Supreme Court ruling.

The court held that the Founding Fathers, in writing the Constitution, drew a clear line between church and state. Therefore, no representative of the state — no public official, no elected politician, no schoolteacher — can cross that line to dictate, force, or encourage school prayer.

So half the states passed laws to make prayer — neither dictated, forced, nor encouraged — possible in their schools. They did it by providing for a period — a moment, a minute, or longer — of silent meditation.

Parents in those states can instruct their children to pray silently during that period, can help the youngsters memorize the prayer, or write it down for them.

Other parents can tell their children to say other prayers, or to daydream, or to read, or just do nothing.

Such laws are not controversial, do not offend reasonable people, and are constitutional. The Supreme Court said so this week in striking down a different sort of law that permitted a different sort of prayer in the Alabama schools.

In Alabama, the legislature's original act provided for a period of silent meditation. Then in 1982, it changed the law to require a period of prayer. That law, the court said, crossed the Founding Fathers' line.

So modern-day crusaders who want every child to pray in school have attacked court members as ungodly liberals. This Sunday, pulpits will be filled with these crusaders, who will preach that the Founding Fathers would be shocked by what the court has done. They will pray for a constitutional amendment to redraw the Founding Fathers' line.

These crusaders are grossly unfair. The "liberal" justices who voted against the Alabama law included Sandra Day O'Connor, Lewis Powell, John Paul Stevens, and Harry Blackmun, all appointed by conservative presidents.

The judges who participated in the decision include those whose belief in God and religious commitments are as strong as the fervor of the crusaders who condemn them.

And the claim by these crusaders that they have some divine vision about what the Founding Fathers would say about modern religious attitudes is fundamentalist folderol.

We do know what the Founding Fathers wrote into the Bill of Rights and why they wrote it. They had rebelled against a nation whose crusaders had used the state to enforce religious beliefs and to persecute non-believers.

So the Founding Fathers drew the line, and laws that allow silent meditation are on the right side of that line. The modern crusaders who would redraw the line or erase it are on the wrong side. It is a fine line, but as Justice O'Connor wrote in her concurring opinion this week: "Our principles of religious liberty require that we draw it."

Amen.

BOSTON GLOBE, Boston, Massachusetts June 6, 1985

Disentangling church and state

Supporters of prayer in the public schools may argue that Tuesday's Supreme Court decision against Alabama's "mediation or voluntary prayer" law justifies their contention that the constitution must be amended to permit school prayer.

They are wrong. The court's 6-to-3 ruling that even Alabama's apparently innocuous law – similar to the Massachusetts law – violates the constitutional separation of church and state should prompt a careful examination of the entanglements that have grown up over the past decade or so, with an eye to pruning them.

In the Alabama case, the court ruled that the inclusion of the words "or voluntary prayer" in the state law "indicates that the state intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."

That neutrality is a cornerstone of American democracy and is violated all too often, especially in the public schools.

– New York City provides 253 nonpublic schools with the teachers and equipment for remedial-education programs. A fiction of church-state separation is maintained by removing religious symbols from the classrooms used by the publicly paid teachers. The Supreme Court will review this case.

– During fiscal 1981, the last year for which figures are available, $608 million in federal funds was directly spent on nonpublic schools, much of it through the Title I (now Chapter 1) program.

By a quirk in that law, Title I funds can go to a private or parochial school if it enrolls a pupil who lives in a public school district that is eligible for Title I – even if the pupil himself would not be eligible.

Massachusetts school officials should begin their examination of such entanglements by making it clear that the state's 1980 law, which mandates that teachers announce "a period of silence . . . for meditation or prayer," does not meet the constitutional test.

SAN FRANCISCO CHRONICLE

San Francisco, California June 6, 1985

The Court and School Prayer

THE U.S. SUPREME Court has come to the quite reasonable — and authoritative — conclusion that Alabama's "moment-of-silence" law is unconstitutional because its purpose was to foster religious activity in the classroom.

The decision does not invalidate such laws in other states that have no religious connection. Indeed, the court strongly suggested it would find many of these constitutional in future cases. It merely reaffirms the court's proper insistence that "government must pursue a course of complete neutrality toward religion."

The legislative record shows the Alabama law's intent: To return prayer to the public schools. And, as Associate Justice John Paul Stevens, author of the majority opinion in this 6 to 3 decision, wrote: That "is quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."

THE COURT, said Associate Justice Sandra Day O'Connor in a separate but concurring opinion, merely held that Alabama "has intentionally crossed the line between creating a quiet moment during which those inclined may pray and affirmatively endorsing the particular practice of prayer."

This may be a fine line, but it has been properly limned by the court. Evangelist Jerry Falwell made the strident comment that "it's much like the Soviet Union ... the court is out of focus." Such a strange and baseless reaction from the zealous right would seem merely to confirm the intelligence and solidity of this court's finding.

ATLANTA CONSTITUTION, Atlanta, Georgia June 6, 1985.

Tom Teepen

Wall of separation still stands

First horse-racing in Birmingham, and now this. Alabama is going to the ponies *and* the Devil.

And maybe not just Alabama. The U.S. Supreme Court has once again taken religion everywhere in the nation from the ministering embrace of state legislatures and has left it in the hands of families and churches. Can religion survive this further ejection from the political saloon?

The politicians, ordained and secular, who have been working this issue as if it were a traveling salesman's territory will tell you to expect dire consequences.

But curiously, the great religious enthusiasms that swept our country in the last century did so without any catapulting from public classrooms and, even more curiously if you think about it, 23 years after the Supreme Court first said religion was not the business of public schools, evangelical activity is on one of its biggest-ever rolls.

Hmmm. Could it be that cause and effect have been scrambled in this matter? Certainly they are unclear.

At stake in the issue's latest outing was an Alabama law, and by extension the ones like it in other states, that ordered a moment of classroom silence daily, with the legislative instruction that students could use it for meditation or prayer or what-have-you.

By adolescence, the what-have-you would seem the likeliest option, making the whole proposition one of doubtful pious gain on balance. But, proponents argued, at least this time the state was not ordering overt religious exercise, the practice that first forced the Supreme Court to make the obvious point way back in 19 and 62 that, well, sure, church-state separation applies to public schools.

The justices saw straight through the Alabama hustle. The legislature had first tried to order prayer into classrooms. (And in a choice between the Lord's Prayer and one written by the then-governor's son, wisely had preferred the latter, what with God having nothing to give out in the way of highway contracts.)

When that intrusion was repelled, the moment-of-silence law was substituted, with a legislative history as plain and blunt as a 200-pound preacher's thump on a Bible. The idea was to bootleg religious promotion past the 1962 prohibition.

And, it ought to be added, although the court discreetly did not, the promotion specifically of fundamentalist Protestant Christianity. The movement for breaching church-state separation exists almost entirely with, and because of, Protestant evangelism and its alliance with the political right. Asked about it, most Americans say they support prayer in public schools, but the apparent constituency instantly breaks down if further questions are asked. Which prayers? To whom? In what form?

It is worth pausing a moment here to look at the court that has so strongly reinforced the basic constitutional principle of church-state separation. Guaranteed, you will hear it denounced as a liberal Supreme Court, but two-thirds of its justices were appointed by Republican presidents.

The six members who concurred in this Alabama case were liberals William Brennan and Thurgood Marshall, moderates John Paul Stevens and Harry Blackmun and conservatives Lewis Powell and Sandra Day O'Connor. A broader or more balanced American political spectrum would be impossible without taking in fringies.

You would think that so emphatic a ruling from such a wide range of informed thought might finally put this matter to rest. But no, already Sen. Jesse Helms (R-N.C.) has hoisted his righteous sword and means to smite the U.S. Constitution. The wall of church-state separation still stands, but the battering at it never ends.

Joe Dolman ATLANTA CONSTITUTION, Atlanta, Georgia June 7, 1985

Never mind the prayer issue, schools should teach religions

I wish they had taught, really taught, religion in the public schools when I was a kid.

We had prayer. We had devotionals. I can recall one teacher who told Bible stories and quizzed us on the Scriptures. Yet this was nothing that most of us small-town Texans from Christian families hadn't already heard.

We heard it in church on Sunday mornings, Sunday evenings and Wednesday evenings. No one in our homogeneous community in the 1950s found it the least bit odd (to my knowledge) that students also heard it at school.

But it would be wrong to say our schools *taught* religion. Religion was such an automatic fact of school life that no one gave it much thought.

And because the schools tended to echo only the popular religious sentiment, nothing was introduced to challenge our parochial views.

Popular sentiment was staunchly Christian and Protestant. Moreover, it assessed things only from a white perspective. In fact, race introduced perhaps the only real religious question that existed for us in those days: Did the Bible support integration? Several iconoclasts suspected that it might.

Our (segregated) schools were silent on that issue. They also had little to say about Judaism or Catholicism, and classroom worship made no concessions to those faiths. Not surprisingly, our lessons neglected entirely any mention of Islam, Hinduism or Buddhism — or any belief, it seems, that had the effrontery to omit both Old and New Testaments.

What an opportunity our educators missed. They had a chance to teach us something, and they blew it.

They could have explained to us that most people on Earth possess both a religion and a culture and that the two bear a close relationship. They could have taught us that, as a general rule, it is a bad idea to assume our beliefs and our culture are inherently superior to all others. They could have told us that it is certainly bad manners to act as if we think this is so.

They could have explained that respect for other people's religions does not necessarily undermine allegiance to our own.

Instead, we came away with the opposite impression: Anything that doesn't fall somewhere between Episcopal and Primitive Baptist is a little odd. It was possible for a person to leave our school system convinced that he and his kind were piety's sole proprietors.

Rather than broaden us, the schools in some ways encouraged narrowness.

Oh well. I would guess it is legally permissible, even now, to teach diverse religious principles objectively in public schools. But I would guess, too, that such an endeavor is fraught with parental perils. It is hard to blame the schools for skittishness.

On the narrowness issue, the Supreme Court's decision this week is about the best we can expect. The court has told the schools — again — that they must not promote religious activity. The edict has been properly hailed as a victory for minority beliefs (in this case, those of agnostics).

But the decision does no harm to religion. It only insists on state neutrality. And though not all members of majority faiths choose to acknowledge it, the decision could be a victory for them, too. It may spare them the folly of thinking that their way is the only way.

No, this does not go down well with everyone. Peter Waldron of Contact America, a radio ministry, believes the decision "turns its back on a God who has provided such privileges." Beverly LaHaye of an outfit called Concerned Women for America labeled it "an act of war against America's religious traditions."

Never mind. The court has only reminded educators of something they should already know: No one has a monopoly on the truth. It is possible to understand that and still uphold "America's religious traditions."

The schools ought to educate students about religious beliefs. But they should not presume to choose a best one.

St. Louis Post-Dispatch, St. Louis, Missouri June 6, 1985

A Fixed Star Of Conscience

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

With those words Justice Stevens, delivering a 6-3 Supreme Court decision, struck down an Alabama statute that promoted public school prayers. The court majority also answered suspicions that it was moving away from a 1971 test that it had used to judge cases involving church and state, and it sternly rebuffed the Reagan administration's efforts to promote prayer in schools.

In 1978 Alabama had passed a law permitting teachers to announce a period of silence for meditation, but in 1981 it approved another measure authorizing silence "for meditation or voluntary prayer." Justice Stevens did not object to the first law, but he declared that "the addition of 'or voluntary prayer' indicates that the state intended to characterize prayer as a favored practice." Under the 1971 test, a governmental action is unconstitutional if its purpose is to advance religion.

Make no mistake that this is not the reason for school prayer efforts in many states and the federal government. Illinois, for example, has a law called into question because it is similar to Alabama's, and its sponsor, John J. Lanigan, says, "The intent was to try to bring God back in the classroom." That same cry will now be resumed by congressional conservatives and leaders of groups such as the Moral Majority who, with President Reagan, support a constitutional amendment for school prayers.

Yet it is important to consider what the Supreme Court has not done. It has never banned voluntary prayers by students who want to pray on their own, without official prescriptions. It does not now prohibit moments of silence which may be used for prayer, unless the state invites prayer as the reason for silence. Nor has the court — nor could it — ban God from the classroom, and it is remarkable that believers would think that they could return God by statute.

What the court has done is to assure that there will be no state interference with matters of conscience and no preference for one religion or another. Many Christian denominations do not want school authorities leading or suggesting prayers; most Jews oppose the idea, and so, of course, do agnostics and atheists. All are entitled to a government neutral about their beliefs.

The court majority that subscribed to Justice Stevens' conception of the First Amendment included Justices Brennan, Marshall, Blackmun, Powell and O'Connor. Chief Justice Burger and Justices White and Rehnquist dissented, but only the latter argued that government need not be even-handed and that the court itself had been wrong in 40 years of dealing with separation of church and state.

The Supreme Court has not been wrong. By clinging to its "fixed star," it has protected the freedom of conscience of all Americans.

Philadelphia Inquirer, Philadelphia, Pennsylvania June 6, 1985

Government's obligation to stay silent on prayer

From the religious right — which embraces but a fraction of Americans who are both religious and righteous — a cry is going up over the most recent Supreme Court ruling on school prayer. The Rev. Jerry Falwell, founder of the Moral Majority, declared that the six justices in the majority "don't understand what freedom's all about."

In a 6-3 decision Tuesday, the court held that the state "moment of silence" laws proliferating around the country are fine and dandy — as long as they don't *promote* religious practices such as prayer.

Sorry, Mr. Falwell, but that's what freedom's all about — the right to remain silent, to pray if you want, but without Big (or little) Government telling you how, when or where.

Somewhere along the line, a lot of folks have gotten the impression — the wrong impression — that the Supreme Court banned prayer in the schools. It has not and it never did. In 1962, it banned the government from officially sponsoring and organizing school prayer sessions.

There's a difference. And that's what freedom's all about — keeping the state out of the religion business. Many church leaders — realizing that freedom of religion is best perserved if the state keeps its distance — hailed the decision. The Baptist Joint Committee hailed it. So did Jewish leaders and the National Council of Churches.

What the court overturned this week was not the right to pray in school or anywhere, but an Alabama law that set aside a moment of silence preferably for "meditation or voluntary prayer." If that sounds like a fine line, it is. Drawing fine lines is what freedom's all about.

Justice John Paul Stevens, writing for the majority, said Alabama went wrong by promoting prayer in the schools, instead of protecting it. "The legislative intent [of Alabama lawmakers] to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence," he said.

That will not satisfy the Reagan administration, which sees no evil in saddling youngsters with state-mandated religious observances. But it did satisfy Mr. Reagan's court appointee, Justice Sandra Day O'Connor. Government must permit, but not prescribe, prayer, she said, concurring with the majority.

Chief Justice Warren E. Burger submitted that the case was "much ado about nothing," that sessions of Congress open with prayers, that official chaplains are paid for from the U.S. Treasury, that Alabama's law was no threat, nor even a "mere shadow."

Not so, argued Justice O'Conner, school kids are a breed apart from adult legislators. And "when government-sponsored religious exercises are directed at impressionable children who are required to attend school," the government's seal of approval is much more likely to result in "coerced religious beliefs."

Guarding against that coercion — not promoting religion — is the customary and proper role of government. That does not assault religion. It is what freedom's all about.

Atlanta Constitution, Atlanta, Georgia June 5, 1985

Let there be (neutral) silence

The flaw in Alabama's case for silent classroom prayer was never very hard to find. In fact, Justice Thurgood Marshall pounced on it smartly last year as the Supreme Court heard oral arguments.

A lawyer was struggling to tell the court why a moment of silence was needed. "The modern American school is a very busy, very noisy place . . . ," he began.

Marshall interrupted: Didn't Alabama students have the right to pray silently before the state passed a law to that effect? Well, yes, the lawyer admitted.

And now, after the court has declared Alabama's law unconstitutional, they still have that right. Moreover, if the state wants to grant them a moment of silence, and if students choose to pray then, they may. After all, how could the court have disallowed silence? Some teachers use it to impose classroom discipline, and if some schools want to have *regular* periods of silence, fine. To outlaw that would be simply silly.

But, the court said, the state cannot suggest that the time be used for prayer.

And that wise decision should send an overdue message to the religious right: The original Supreme Court decision 23 years ago that outlawed organized prayer in public schools was not just some left-wing aberration. The Warren Court's judgment has been affirmed by folks as ideologically diverse as justices Marshall, Sandra Day O'Connor and John Paul Stevens.

All are agreed that the piety of public-school students is perhaps the business of parents, friends and clergy — but it is not the business of the schools. Legally, this view keeps the wall of separation between church and state quite properly intact. More practically, it protects children of minority faiths against ostracism.

What about the majority?

The majority should relax. There is not a court on the planet with clout enough to stop silent prayer. It will continue in the schools. Students (of any religion) may even utter prayers aloud and stay within the law. The caveat: Only that teachers and school systems may not promote religious activity. Even if it weren't the law, wouldn't simple politeness alone demand such a policy?

Daily Sentinel, Grand Junction, Colorado June 6, 1985

Old debate

The central question at issue in the U.S. Supreme Court's decision this week that wisely struck down an Alabama statute providing for periods of "meditation or voluntary prayer" in public schools was debated and seemingly resolved in this country more than 200 years ago.

The question is simple. Namely, is it the duty of government to promote religion, or is religion better served if government keeps its meddlesome nose out? This country's entire historical tradition speaks loudly on behalf of the latter.

Consider the following debate:

In the Virginia Legislature in 1784, Patrick Henry argued, "The general diffusion of Christian knowledge hath a natural tendency to correct the morals of man, restrain their vices and preserve the peace of society." Toward that end, Henry sponsored a bill requiring each Virginian to pay a moderate tax for the support of religion, and each taxpayer had the right to designate which church should receive the money.

On the other side of the debate were Thomas Jefferson and James Madison, authors of the Declaration of Independence and the U.S. Constitution respectively.

Madison argued, "The same authority which can establish Christianity, in exclusion of all other religions, may establish ... any particular sect of Christians."

Madison and Jefferson carried the day — in no small part, by the way — because a number of religious groups rallied to their position.

Madison, in turn, introduced a bill written by Jefferson which referred to the "meanness and hypocrisy" produced by attempts to promote religion. The bill called it an "impious presumption" for government "to assume dominion over the faith of others." The U.S. Supreme Court found Alabama's statute similarly objectionable. The high court perceived the Alabama statute as a transparent effort by government to promote prayer, and by logical extension, religion in public schools.

As is their wont, school prayer proponents have cast the issue in terms of godliness vs. godlessness. That's nonsense and, deep down, they probably know it.

It wasn't the duty of government to promote religion in the era of Jefferson, Madison and Henry. It remains ever more so 200 years later.

Des Moines Register, Des Moines, Iowa June 8, 1985

Prayer during meditation

It probably is too much to expect that the Supreme Court's latest ruling will quiet the acrimonious debate over prayer in the public schools, but it ought to. The 6-3 decision provides a way to accommodate those who wish to pray but does not force a religious observance on those who do not.

The court struck down an Alabama "moment of silence" law under which children could be instructed to meditate or pray. The court said the law was drafted in such a way that it was clearly intended to endorse religion as a "favored practice."

Thus, the court reaffirmed its interpretation of the First Amendment as requiring the government to be neutral on the subject of religion.

At the same time, members of the court said that truly neutral "moment-of-silence" observances in public schools do not abridge religious liberty. Justice John Paul Stevens, in the majority opinion, referred to "every student's right to engage in voluntary prayer during an appropriate moment of silence."

Justice Sandra Day O'Connor, in a concurring opinion, said Alabama "intentionally crossed the line between creating a quiet moment during which those so inclined may pray and affirmatively endorsing the particular religious practice of prayer," but she said such a law doesn't violate the Constitution if it doesn't favor the child who chooses to pray over the child who chooses to meditate or reflect.

"It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren," said O'Connor. We agree.

●

By coincidence, officials at several Des Moines high schools set a good example at recent graduation ceremonies, by including moments of silence in which the graduates were asked to reflect on who had helped them during their 13 years of public school.

Beautiful! Such an approach allows time for voluntary prayer while maintaining the government's official neutrality on religion. It should provide a practical way to cool inflamed passions.

But the debate probably won't end, because it's an issue well-suited to demagoguery, and also because there is a legitimate constitutional issue. Does the Constitution really require the government to be neutral on religion, or must it merely refrain from establishing a particular religion?

"Nothing in the establishment clause requires government to be strictly neutral between religion and irreligion," said Justice William H. Rehnquist in a dissent from the Alabama decision.

We think, together with the majority of the Supreme Court, that strict neutrality is necessary, but we respect the point of view that Rehnquist expresses. Let the debate continue, but we hope the volume of shouting can now be lowered a bit so that it stops drowning out discussion of other important educational issues.

A 12

The Evening

Baltimore, Friday, June 7, 1985

Editorials

Politicizing prayer

Let us begin our day with a moment of silent meditation.

The difference between those words and the words *Let us pray* are a distinction without a difference, but still a vital distinction because one is constitutionally permissible and the other is not.

Tuesday's Supreme Court decision which in effect authorized the moment-of-silence was concurred in by one justice appointed by President Eisenhower, one by Lyndon Johnson, two by Richard Nixon, one by Gerald Ford, and - yes - one by Ronald Reagan.

Such an unusual consensus, one would think, ought to settle this issue to the satisfaction of reasonable people. The decision also afforded a remarkable opportunity for President Reagan to cite the legal reasoning of his own popular appointee to the Supreme Court, Justice Sandra Day O'Connor, to lend presidential support to that consensus.

Unfortunately, the President chose to do otherwise. Speaking at a political rally in Alabama, he made known his intention to persevere in support of a constitutional amendment which would make it possible for states to *mandate* sectarian religious services in the public schools. History tells us that such an amendment will never pass in this land of religious diversity.

It was a sad day when the President passed up an opportunity to put this divisive issue to rest once and for all.

A26 THURSDAY, JUNE 6, 1985 THE WASHIN

The Washington Post

AN INDEPENDENT NEWSPAPER

A Moment of Clarity

"IF THERE is any fixed star in our constitutional constellation," Justice Stevens reminds us in the words of an earlier Supreme Court decision, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Recalling this holding, the justice now writes in no uncertain terms, "The State of Alabama, no less than the Congress of the United States, must respect that basic truth."

At issue before the high court this week was an Alabama statute providing for a moment of silence in public school classrooms, in order to allow for meditation or voluntary prayer. Six justices saw the language of that statute, the legislative history and the expressed motives of Alabama legislators as indicating a clear intention to endorse religion and return voluntary prayer to the schools.

Twenty-five states permit or require public schoolteachers to have students observe a moment of silence. Alabama, in fact, had exactly such a neutral law on the books when, in 1981, it enacted a second statute, explicitly suggesting that the quiet period be used for prayer. The constitutionality of the original Alabama law was not before the court in this case, nor were the similarly neutral statutes in the other two dozen states. But it seems clear from this week's opinions that a majority of the court would find no constitutional impediment to such an observance.

Alabama's moment of silence *for prayer* statute, however, does not meet the standard the Supreme Court set out 14 years ago for determining whether a statute violates the Establishment Clause of the First Amendment. Laws having religious overtones are permissible under the constitution only if they 1) have a secular legislative purpose, 2) have a primary effect that neither advances nor inhibits religion, and 3) do not foster an excessive government entanglement with religion. A neutral moment of silence law may meet this test, but the Alabama prayer period does not.

In practical terms, this decision, *Wallace v. Jaffree*, may have little impact, since the earlier Alabama law—and the statutes of 24 other states—remain in force. As an indication of the justices' strong commitment to retaining the separation of church and state in the public schools, though, it is heartening. Prayer is personal, private and protected. Nothing prevents an individual child from praying silently in any place at any time, including a period during the school day set aside for silence. It would be impossible to enforce such a prohibition even if the state wanted to. But neither can the government force or encourage religious practice in a diverse and free society, especially in schoolrooms where attendance is compulsory and children are under pressure to conform. The court is clear in announcing that any state's attempt to subvert these basic and cherished principles will not be allowed.

The Kansas City Times

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Vol. 117 Thursday, June 6, 1985 No. 233

Church and State

The Supreme Court decision striking down an Alabama law permitting a moment of silence for meditation or prayer in the public schools is a good one. In the long run it will serve the cause of religion in the United States.

The majority decision held that the sole purpose of the law was to promote religion and prayer, and therefore was in violation of the Constitution. The First Amendment is about as clear as it can be:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .

The *free* exercise of religion does not lie in the state placing children and teachers into conditions of conformity in which it is "suggested" that prayer is permitted. The issue is not what is thought or whispered under such circumstances but that children should be put into such a position of state regimentation at all.

Well-meaning people who propose school prayer are fervent disciples of various sects and orders. So strong is their faith that they cannot understand why all do not wish to share in their vision. But there are many visions, and while the Constitution guarantees the right to pursue any or all, it does not permit the state to compel the pursuit of any or all. The essence of public school prayer is to force other people's children into a mold. In other times and even now in other lands, refusal to conform with religious law is dealt with severely. The United States wants none of it.

This country is one of the most religious on Earth. Its churches and synagogues are everywhere and they are often full. Religion is a private matter, and it is vigorously supported. In nations where a specific religion has been favored by the state, places of worship are often empty. Traditions of anti-clericalism go deep. Parliaments in lands that nominally are overwhelmingly of a single faith, where the church has been a part of the political apparatus, pass restrictive laws on religion. State support often means indifference and finally massive rejection.

One of the primary strengths of religion in the United States is the separation of church and state. The Supreme Court is abetting that strength.

CHRISTIAN SCIENCE MONITOR
6/6/85

Protecting religion

THE Supreme Court of the United States some 22 years ago ruled that the Constitution forbids a moment of required spoken prayer in the public schools. It has now ruled that required moments of silence in schools, if for the intended purpose of prayer, likewise are forbidden by the Constitution.

In an Alabama case, the court ruled 6 to 3 that the First Amendment guarantee of separation of church and state was violated by a state law allowing moments of silence for prayer, finding that the statute's intent was to promote religion.

The net effect of the court's latest decision is to again protect religion from becoming embroiled in public, governmental affairs.

No doubt the decision will not please those who would promote religion through the venue of government or control the state through ecclesiastical suasion, or both.

Nonetheless, history records that the fused temporal might of church and government has too often brought much misery to those seeking to live or pray according to their own conscience or private leading.

The start of such repression can come under the most innocuous of guises, in which those seeking to protect both religious and state independence are claimed to oppose an obviously useful practice — such as prayer during the school day.

One can argue, pertinently to the religious orientation of those promoting school prayer, that "moments" of prayer, whether silent or audible, are not enough, given the commandment's standard to "pray without ceasing." Nothing can keep the individual from praying fervently, constantly, in gratitude or in need, or simply to stay in touch with the spiritual presence of intelligent good in his experience. The state can neither say when to pray nor in what manner or moment the Maker should reveal himself. The state is no party to revelation.

Better citizens, morally and spiritually, make for better government. Good government should abet an improved climate for the practice of religion.

But only confusion, especially for children, can come from using public law and facilities to compel the individual's attention toward a practice that is essentially a private matter between him and his Maker. We applaud the court's decision.

Chicago Tribune

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18 Section 1 Thursday, June 6, 1985

The silence of a cathedral

In one of those moments of high constitutional ritual whose meaning far surpasses its practical consequences, the U.S. Supreme Court struck down an Alabama law authorizing periods of silence in public schools for "meditation or voluntary prayer."

The dispute was abstract, almost theological. It came down to a choice between two faiths, one that sees religion as so important that it ought to be embraced by government, and another that sees religion as too important to be subject to the usual mechanisms of majority rule.

The constitutional faith prevailed in the Supreme Court, as it should have.

In effect, the court simply held that the proper role for the state in matters of religious belief is silence: the pure, total silence of neutrality and tolerance. The Alabama law explicitly authorized voluntary prayer in the public schools, and six justices agreed that this went over the line.

It is a very thin line, and yet the persistent claims of religious majorities in this country repeatedly have forced the court to defend it. But the very intensity of feeling involved in the movement to authorize prayer in the public schools demonstrates how important the principle of neutrality really is.

The constitutional provision forbidding government from establishing an official religion is meant to encourage freedom of belief, to nurture diversity and to protect the integrity of religious minorities. It was written in the wise understanding that the beliefs about God have a central and vital place in the human spirit. The authors of the Bill of Rights realized that when a political majority shares a common set of these beliefs, it easily can succumb to the temptation to impose them on others by legal decree.

It is natural that people who have discovered glory and solace in a faith in God should have a missionary desire to awaken it in their fellow citizens. They are protected by the Constitution in this endeavor. No law may stop them from spreading the word. They may use every instrument of persuasion and example save one—the coercive power of the state. The Constitution withholds that device because it accords equal deference to all beliefs about the ultimate and because the only meaningful choice in matters of faith is individual and utterly free.

This is why the court has decided that the government must remain silent when it comes to religious belief. The Constitution does not require the state to effect the sneering silence of disdain. The law comes before religion as a person stepping into a great cathedral or gazing up in wonder at the immensity of the sky at night. Its silence arises from a sense of awe and humility and ultimate respect.

The Miami Herald

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Silence Is Golden

Prayer in School

JUSTICE Sandra Day O'Connor's concurring opinion in the Supreme Court's rejection of Alabama's school-prayer law captures the principles involved. She notes sensibly, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." She is correct, and those who assert such a threat seem to be demanding that the schools adopt an attitude not of neutrality but of hostility toward private, voluntary reflection that may — or may not — include prayer.

Justice O'Connor concluded, "The Court does not hold that the [First Amendment's] Establishment Clause is so hostile to religion that it precludes the states from affording schoolchildren an opportunity for voluntary silent prayer. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer. This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it." In this case, the Court did so with admirable finesse.

The 6-3 decision warns that states may use the moment of silence, but not as a subterfuge to smuggle official prayer back into public classrooms. Thus it comforts those who champion genuine religious freedom. But the decision is not the anti-religious cudgel that Moral Majority leaders would have us believe as they seek to whip up sentiment for a pro-prayer amendment to the Constitution. Quite the contrary.

The Court properly has insisted that the public schools must be a neutral zone in which private religious expression is neither precluded nor endorsed. The moment of silence serves many legitimate secular and educational purposes as well as a religious one. It therefore is acceptable so long as it is not surrounded with official reminders about prayer or prayerful attitudes.

As one of the states that has such a statute, Florida ought to examine its own legislation to ensure that it passes the Court's test of neutrality. The Florida law's explicit reference to "the purpose of silent prayer or meditation" probably should be expunged, thus leaving the purpose of the silent period to the individual student. In practice, Dade's school system and many others in Florida already conform to the Court's standard. The state's attorney general and commissioner of education should draft guidelines promptly to bring nonconforming counties into line.

Those steps should not generate controversy. The Court has done its job, splitting a fine hair cleanly. Troublemakers from both sides now should butt out and let the question rest where the Court has put it: in a soothing, neutral blanket of silence.

The New York Times

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June 6, 1985

Neutral, Not Hostile, to Religion

People who want to put state-sponsored prayer back in the schoolroom lost their big battle long before the Supreme Court decision handed down this week. Last year, when the Court agreed to review an Alabama "moment of silence" law, the Justices also ruled on a companion prayer statute. It, they said unanimously, was so obviously unconstitutional as to need no argument.

Now, in the course of striking down the silence law, the Court makes resoundingly clear that there are no votes — none — for overturning the Court's decisions of two decades ago forbidding prayer and Bible-reading in public schools.

The hopes of some fundamentalists and advocates of enforced piety to keep the schoolhouse door open for devotional exercises have been rightly dashed. Kids can pray to themselves, even in the classroom, the Court makes clear, and states may set aside a minute of free quiet time. But they may not do so with laws that intend to promote prayer.

The decision's importance lies in its adherence to the principle of government neutrality with respect to religion. Neutrality need not be arid or hostile, said Justice John Paul Stevens in an opinion for six members of the Court. Indeed, "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful," not of Government-sponsored worship.

The question in the Alabama case was whether the state departed from neutrality with a law permitting teachers to start the day with a silent minute "for meditation or voluntary prayer." As the Court could not help noticing, Alabama's Legislature betrayed a religious purpose casually and completely. The law's chief sponsor in the state Senate, invited to justify it for a reason other than restoring school prayer, replied, "No, I did not have no other purpose in mind."

Moment-of-silence laws in half the states must now undergo the Court's test. Surely New Jersey's will flunk though it studiously avoids mentioning "prayer." Until taken to court, its sponsor loudly pledged to "bring prayer back through the front door." Laws elsewhere may pass muster depending on their language, history and application.

The Court's reasonable approach will not still the clamor from those who don't like the Constitution the way it is. But it will encourage the majority of Americans who support it, and its protection against state interference in matters of faith.

THE SUNDAY DISPATCH
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Prayer in the schools

In 1978, Alabama passed a law authorizing public schools to conduct a period of silence "for meditation."

In 1981, the state passed a law authorizing a period of silence for "for meditation or voluntary prayer."

In 1982, Alabama's legislators went a step further, passing a law authorizing school teachers to lead "willing students" in a prescribed prayer.

A man with three children in the Mobile schools filed suit, asking for an injunction restraining school officials "from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public schools..."

Action in the case produced a judicial stamp of approval for the 1978 law, and a ruling that the 1982 law was unconstitutional. Last week, the U.S. Supreme Court declared the 1981 law to be unconstitutional as well.

Writing the majority opinon, Justice John Paul Stevens said, in part, "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism.

"But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amdendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects, or even intolerance among "religions," to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in Board of Education v. Barnett, (1943):

"'If there is any fixed star in our constitutional constellation, [illegible], nor petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'"

Stevens concluded that the 1981 Alabama statue was part of an attempt to establish prayer in the public schools, an aim in conflict with "the established principle that the Government must pursue a course of complete neutrality toward religion." The law is therefore unconstitutional, he wrote.

The decision is a sound one. The public schools are not the proper place for any sort of organized religious activities, and it's good to see the high court coming down solidly (6-3 in the Alabama case) against misguided attempts to make religion the fourth R.

...Vegas Review-Journal/Thursday, June 6, 1985

Opinion

The court ruling on school prayer

Tuesday's decision by the U.S. Supreme Court that organized prayer in public schools is a violation of the First Amendment runs contrary to what some people think.

Children, they believe, should be able to pray — or even not pray if they so elect — for a few minutes during every school day.

The Nevada Legislature agreed in 1977, directing school districts to "set aside a period at the beginning of each school day, during which all persons must be silent, for voluntary individual meditation, prayer or reflection by pupils."

It's difficult, however, to see how school prayer advocates would be upset with the court's 6-3 decision, which essentially upholds a 1962 court ban on public school prayer as a violation of the constitutionally required separation of church and state.

If anything, it can be argued that prayer advocates won a partial concession.

As background, the First Amendment states that "Congress shall make no law respecting an establishment of religion . . ." By an extension of the 14th Amendment, neither shall any state legislature. That means, the court has said twice, that governments cannot impose religion on the people — or on children by setting aside a few minutes specifically for prayer in public schools.

But the Supreme Court's latest decision does not mean that every state law providing for daily moments of silence is invalid. It only means that state laws that specifically include the word "prayer" are unconstitutional.

It would seem, based on reports of the court decision, that Nevada's law is unconstitutional on its face because it includes the word "prayer." Unfortunately, the Legislature adjourned shortly after the Supreme Court decision Tuesday, so Nevada will have to wait two years until lawmakers meet again to amend the law.

Some — including President Reagan — who have advocated a constitutional amendment to allow school prayer sessions won't be assuaged by this reading of the ruling.

But it seems to be only a matter of semantics. Students can still take a few moments of silence, only "prayer" may not be associated with it in any way.

And in those moments they can pray — to whatever god they want, or to just pass the upcoming spelling test — or recite the multiplication tables or work mentally on their Madonna impressions.

As Justice John Paul Stevens said in writing for the court, there is an "established principle that the government must pursue a course of complete neutrality toward religion." That's what the First Amendment says, and that's really all the six justices said.

Up to now, neither Stevens nor the Supreme Court has faced the contradictory issues as to why sessions of Congress begin with prayers, or why the United States has "In God We Trust" printed on its money, but those are different, and knotty, matters of symbolic significance to many citizens.

The [illegible] and of prayer — of any religion and any prayer — are better suited for discussion and teaching in the church or in the home, away from governments like school districts and their classrooms.

A moment of silence is neither offensive or doctrinaire, but the court has made it clear that the religious aspect of that moment is better left to the directions of the family and the church, not the school.

Statement of

GARY M. ROSS, PH.D.
Associate Director

Department of Public Affairs and Religious Liberty
General Conference of Seventh-day Adventists

Regarding

POST-JAFFREE SCHOOL PRAYER CONTROVERSY

Mr. Chairman, and members of the Subcommittee: I am Gary M. Ross, Associate Director of the Department of Public Affairs and Religious Liberty, General Conference of Seventh-day Adventists.

This church organization, which is headquartered in Washington, D. C., and which deeply cares for the vitality of religion, fosters religion by defending its free exercise and by protecting its independence from government.

Rather than commenting on specific pending legislation, this testimony will focus on the general aftermath of Wallace v. Jaffree and especially on critical responses to that ruling.

Depictions of America in shambles because of prayer-related deprivations in the public schools are now a fund-raising bonanza, but they are not likely to produce much legislation. This is because of Congress' preoccupation with other matters, because of its memory of division and defeat in recent efforts to legislate about prayer, and because of the changed (post-'84) makeup of Congress.

Just the same, this occasion provides interested parties opportunity to locate themselves relative to the currents swirling about.

First, although statutory provisions for moments of silence are subject to mischief on various counts and are for purposes of prayer

redundant, the fact is that the Supreme Court in Jaffree condones if not invites them. It is also true that parishioners comprehend the purist position on moments of silence with difficulty and dislike impressions left by it. Therefore, Seventh-day Adventists would not object to such a statute absent evidence of religious purpose.

Second, the Jaffree ruling may sanction reference to prayer on the face of a statute despite having struck down an Alabama statute with such a reference. We say that to this extent the ruling would be wrong, for legislation about "silence for meditation and voluntary prayer" crosses the threshold from potential to actual mischief. However worded and however justified, such laws have the intent of preferring religion. In today's climate bad facts inevitably surround their promulgation. And should a constitutional amendment emerge that sanctions "silence for meditation and voluntary prayer," we would protest and oppose with energy. We would do this not only because the Founders admonished frugal use of the amending procedure, but also because an amendment would upset the case law that the High Court has developed in the course of interpreting and applying the religion clauses of the First Amendment.

Third, in rejecting the Establishment Clause doctrines that have prevailed since 1947 the dissenting opinions in Jaffree constitute a beguiling but also disquieting and alarming philosophy of church-state relations. That philosophy is growing in popularity. I suggest now some aspects of what a critique of the dissenting philosophy might include.

A. The analogy between what pupils do in the classroom relative to the Transcendent and what Congressmen and Justices do in their chambers relative to the same thing, is tired and misleading. Coerced attendance of impressionable juveniles obtains in the one case, but not in the other. This makes sufficient difference to put the analogy to rest.

B. Regarding the freighting of the Establishment Clause with Jefferson's metaphor of the "wall of separation," it does

not suffice to debunk the third President as a secondary source, an absentee, a less than ideal barometer of contemporary history. Jefferson's Virginia Statute for Religious Freedom conveys a separationism that makes the Danbury letter anything but idiosyncratic. That statute dates to within five years of the First Amendment. Madison, who labored with Jefferson for its enactment, drew upon it if he drew upon <u>any</u> fulcrum of ideas when deliberations on the amendments commenced. That he considered the First Amendment politically expedient rather than constitutionally imperative--if indeed he did--does not alter the probability that he used this source.

C. Central to the revisionist interpretation of the First Amendment is Justice Rehnquist's belief that the Framers sought only the neutrality of government vis-a-vis particular religions, and loathed the idea of a national church. This is to say that they condoned if not invited <u>evenhanded, nonpreferential aid to religion</u>. The Northwest Ordinance, Thanksgiving Day proclamations, and governmental support of Indian education are adduced as evidence of a broad range of permissibles under this doctrine. Yet historical analysis, which is the basis of the dissent, requires its own critique.

1. It is a widely supported proposition that the meaning of the Constitution can be determined by reference to the intentions of those who made it. Being faithful to that method, one acknowledges that the words used by our forebears reflect their intentions. It is therefore significant that what the Framers literally proscribed was the establishment of <u>religion</u> and not merely the establishment of <u>a religion</u>.

2. Historical analysis appreciates the social context in which ideas evolve. That context typically changes through time, and America's has changed radically. Even if the Rehnquist conceptualization of church and state once did obtain, circumstances now render it dated. The Founders lived in a society in which religiosity was normative, unquestioned, and predominately Protestant. Today, thanks to numerous waves of immigration and to other factors, religion has diversified. The possibility of evenhandedly aiding religion has shrunk proportionately. Nonpreferential assistance is really a euphemism for government support of Christianity.
3. Constitutional interpretation cannot be exclusively historical, of course. Among other approaches is that of logic. In this regard, the adage about the right to freedom of religion presupposing the right to freedom from religion still makes sense. But freedom from religion amounts to a call for governmental neutrality vis-a-vis religion and nonreligion. Government is expected to honor even one's option for secularity--no religion at all. It is not enough to oblige neutrality in the face of particular religions.

SYNAGOGUE COUNCIL OF AMERICA

AND

NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

TESTIMONY

This testimony is being submitted on behalf of the Synagogue Council of America (SCA) and the National Jewish Community Relations Advisory Council (NJCRAC). We wish to express our appreciation to the Subcommittee on the Constitution of the Senate Judicary Committee for the opportunity to express our deep concerns regarding the important Constitutional and religious issues raised by S.J.Res. 2 and S.J.Res. 3.

The SCA is the umbrella organization for the nation's major Orthodox, Conservative and Reform congregational and rabbinical bodies. It comprises the Union of American Hebrew Congregations and the Central Conference of American Rabbis (the Reform Movement), the United Synagogue of America and the Rabbinical Assembly (the Conservative Movement), and the Union of Orthodox Jewish Congregations of America and the Rabbinical Council of America (the Orthodox Movement).

The NJCRAC is the umbrella organization for 11 national Jewish agencies -- American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, B'nai B'rith, Women's American Organization for Rehabilitation through Training (ORT), Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of Orthodox Jewish Congregations of America, United Synagogue of America and Women's League for Conservative Judaism, Union of American Hebrew Congregations and 113 Jewish community relations councils across the United States.

The Synagogue Council of America and the National Jewish Community Relations Advisory Council wish to express their unified opposition to any Constitutional amendment on behalf of school prayer. Our opposition is based on three grounds: our respect for the integrity of our constitutional system of government, our concern for the religious liberty of American children, and our fear that such efforts trivialize and cheapen the meaning of religion in American life.

We are particularly concerned that S.J. Res. 2 and 3 seek to address the complicated issue of school prayer by altering the Constitution and by modifying the First Amendment provisions which are the foundation of our doctrine of separation of church and state. Religiously and politically, we Jews have known in America religious and political freedom and opportunity unsurpassed in our history. We therefore know better than most the distortion inherent in the claim that the "separation of church and state" in America is anti-religious. Nothing could be further from the truth. By protecting organized religion from government control and manipulation and by protecting individual religious liberty and expression from government interference, the First Amendment has safeguarded religion, allowing it to flourish with a diversity, strength and dynamism virtually unmatched anywhere else in the world. We must therefore resist any attempt to tamper with this precious heritage.

We know that members of Congress have received many letters in favor of rewriting the Constitution on this issue. But the responsibilities of the legislator must always be the weighing of conscience and principle and not the weighing of mail alone. If the fundamental protections of the Constitution were to bow to the wind of whatever popular passion stirs each generation, the entire Bill of Rights would already be a relic of history.

The onerous risks of changing the Constitution are particularly unnecessary in this situation since these amendments are aimed at curing a problem which does

not exist. The Constitution has always protected the right of school children to pray in whatever manner and at whatever time is appropriate and consistent with their personal beliefs. Time and again the Supreme Court has made this point, most recently in Wallace v. Jaffree. Under current law, children are allowed to pray alone or together, silently or aloud at any time that they wish. There are only two restrictions. First, like any other of the child's activities, school prayer cannot interrupt the educational activities of the classroom. In other words a child can not get up in the middle of a reading lesson or exam and begin to pray aloud. Second, prayer activity cannot be organized by the school officials since, as agents of the state, that would constitute "establishment of religion." All of us who favor the right of children to pray voluntarily in our public schools should be reassured by the words of Justice Sandra Day O'Connor's concurring opinion in Wallace v. Jaffree, "Nothing in the United States Constitution as interpreted by this Court ... prohibits public school students from voluntarily praying at any time before, during, or after the school day." In short, a Constitutional amendment would not guarantee anything which our Constitution does not already guarantee in the strongest, most eloquent language.

Second, we are gravely concerned about the implications of these amendments for the religious rights of American children. Neither of the proposed amendments could be enacted without numerous violations of the spirit of the Constitution. They would not only give rise to a plethora of court battles regarding their interpretation, but would create an umbrella under which inevitable abuses will occur. They would unnecessarily furnish an irresistable temptation for certain groups, especially those who enjoy local numerical superiority, to impose their religious will in the classroom. Repeatedly Congressional hearings have heard compelling testimony from witnesses as to the price paid by minorities when well meaning, religiously zealous teachers, students and administrators attempt to stretch the limits of the law or prejudicially interpret its strictures. All too often, such abuses go unchallenged. In many communities, it may be unbearably threatening for a lone Jewish or other minority family to protest the unfair effects of these amendments.

As the Synagogue Council of America stated in its 1979 resolution on school prayer:

> It has been, and continues to be, our conviction that it is inappropriate to introduce prayer of any kind into the public school setting. ... [Organized school prayer] must by the sensitive and intensely personal nature of religious belief, do violence to the religious sensitivities of some of the students involved.
>
> The public schools of this country serve the admirable and socially significant function of bringing together on common ground students from a diversity of cultural and religious backgrounds. The introduction of public prayer into such a setting jeopardizes the delicate sense of community, and unnecessarily intrudes an emotional and divisive factor.
>
> The home and house of worship are the most significant loci of worship. We urge our legislators to oppose all moves to bring religion into the institutions of public education, institutions where history has shown it does not belong.

The only way to protect the rights of all children is to maintain that Constitutional doctrine which has been a bulwark of our liberties for 200 years: The state must remain neutral on the issue of religion, neither encouraging nor discouraging but allowing the individual citizen to do as he or she sees fit. As the recent Supreme Court decision in Wallace v. Jaffree reaffirmed, students must remain free to pray when they want to, not when the school wants; to pray in the manner they choose, not as the school directs; to pray where they want and not where the school decides. The Constitution currently allows prayer; the amendments under consideration today actively endorse it.

When schools organize time explicitly for prayer, as is the primary purpose of the proposed Constitutional amendments, they actively encourage prayer. This is "establishment of religion". When children are forced to pray at a time or in a manner that they feel is inappropriate or are forced to leave the room while their friends are praying, it is a violation of the children's religious liberty. In both circumstances the schools have violated the letter and the spirit of the First Amendment.

Finally, these amendments raise issues regarding the nature of religious commitment in American life. We firmly believe that religious commitment is vital to our well-being as a society. But we are convinced that such commitment cannot be instilled by a moment of teacher imposed prayer. It must come from our houses of worship and from our homes. To suggest that our children can be suitably inspired by a mechanized and essentially trivialized moment of silent prayer demeans religion and ill-serves the Constitutional rights of all the people. As the Synagogue Council of America stated in testimony before Congress in 1960: "The effect of such denatured religious expression could only be to give children a distorted sense of what real prayer is."

For Jews, private voluntary prayer can occur at any time, in any place; it can be a response to an event, a feeling, or a need. An amendment allowing school officials to set aside an arbitrary time of the day for prayer, a time which has no religious significance for the observant Jewish child, does nothing to further meaningful prayer and represents an unacceptable intrusion of the state into the child's religious life. This is, of course, true not only for Jewish children but for any child who believes in the religious significance of prayer.

Public prayer in the Jewish tradition is formalized both in content and manner of recitation, given shape by and giving expression to a 4,000-year encounter with the Divine. Jewish prayer has evolved into a sophisticated ritual that demands of the worshipper a selection of carefully designed blessings and actions. To try to reduce this experience to a minute of silent prayer trivializes and secularizes Jewish worship.

The National Jewish Community Relations Advisory Council concluded in its 1984-85 Joint Program Plan: "...The institutionalization of prayer in any form, spoken or silent, fosters what in essence is a religious exercise that in a public school setting can have a coercive effect on a school child and, at bottom, debases distinctive religious expression which is vital to maintaining particularistic religious beliefs. Paradoxically what silent prayer does is foster religious indifferentism."

The Synagogue Council of America and the National Jewish Community Relations Advisory Council share a deep conviction that the Constitutional amendments that are before you -- however well-intentioned the motivations of their sponsors and however noble the objectives contemplated -- represent a dangerous experiment upon American liberties. Either amendment, if adopted, will begin an irreversible process of unraveling the historic fabric of the Bill of Rights. Our profound respect for the Congress and the desire of its members to serve the common good leads us to say to you, the members of the Senate Subcommittee on the Constitution: The concern of our government is not the promotion of religion; it is the conservation of a free and just society that protects all religions and beliefs equally. That, and nothing else, offers the surest safeguard for the preservation and strengthening of our religious heritage.

Statement to: Subcommittee on the Constitution
Senate Judiciary Committee

Subject: S.J.Res. 2; S.J.Res. 3

By: Unitarian Universalist Association Washington Office
Americans for Religious Liberty

Presented by: Edd Doerr, Executive Director, Americans for Religious Liberty, Box 6656, Silver Spring, MD 20906 (Telephone: 598-2447)

June 25, 1985

Mr Chairman and Members of the Committee:

The Unitarian Universalist Association, with 175,000 members, is composed of over 1,000 congregations in the United States. Unitarian Universalism has a long history in our country, going back to the time of the American Revolution. Indeed, the church of the Pilgrims in Plymouth, Mass., is a Unitarian Universalist church. At its annual General Assembly, held in Atlanta only last week, the delegates voted overwhelmingly to support a resolution reaffirming the denomination's stance in favor of strict church-state separation and the religious neutrality of public education.

Americans for Religious Liberty is a nonprofit national educational organization dedicated to defending the religious liberty of all persons and the constitutional principle of separation of church and state which is the basic guarantee of religious freedom. ARL's members represent a broad cross section of our nation's rich diversity of faiths.

We recognize that many people do not fully understand the U.S. Supreme Court's rulings over the years on the subject of religion and public education. It is unfortunate that some media figures have misled many into thinking that the Court is somehow hostile to religion and that students in our public schools have been deprived of the right to pray. The truth, however, is that the Supreme Court is not hostile to religion and has never ruled, or even suggested, that students may not engage in personal prayer or other forms of religious expression. The Court has only ruled that state sponsorship or regimentation of or involvement in religious activities in our public schools is incompatible with the religious neutrality required of government and public schools by the First Amendment.

The Unitarian Universalist Association Washington Office and Americans for Religious Liberty oppose both S.J.Res. 2 and S.J.Res. 3 for the following reasons:

1. No amendment to the Constitution is needed to safeguard the right of students to individual, personal prayer, a right which has not been infringed. To take the extraordinary action of amending the Constitution to protect a right that is not endangered is both unnecessary and frivolous.

2. Insofar as the proposed amendments refer to "group silent prayer" or "group prayer", they smack of government sponsorship of or involvement in an activity requiring the organization, regimentation, or coordination of a number of students in a religious endeavor. This suggests that the state or its agents favor group over individual religious expression; that the state or its agents have the competence and authority to decide when students should engage in a religious activity; and that prayer, whether vocal or silent, is a specific religious activity which the state and its agents prefer over other modes of religious activity or expression, such as reading religious literature or performing good works.

3. Either of these two proposed amendments would result in teachers being pressed into service as religious functionaries, roles generally beyond their competence and not of their choosing.

4. These two proposed amendments suggest that our churches and synagogues, our families, and our children are not able to manage their religious lives without the help or interference of the state. If history has taught us anything, it is that government "aid" is not only not necessary but is actually more harmful to religion than our country's present policy of benevolent neutrality, based on the principle of separation of church and state.

5. Government sponsorship or regimentation of religious activity breeds disrespect for religion. This has been the experience of such countries as Great Britain, where nearly all students are subjected to government regimented devotions and religious instruction.

We respectfully urge that the Subcommittee not support either of these two unnecessary and potentially harmful proposed amendments.

WRITTEN TESTIMONY

SUBMITTED FOR THE RECORD

BY:
Mr. Faith Evans
Office for Church in Society
United Church of Christ

THE UNITED CHURCH OF CHRIST, THROUGH ITS EXECUTIVE COUNCIL, HAS HAD AS ITS POLICY SINCE OCTOBER 1971 OPPOSITION TO GOVERNMENTALLY MANDATED SCHOOL PRAYER. WE BELIEVE THE PRESENT LEGISLATION BEFORE THE CONGRESS VIOLATES CLEAR PRINCIPLES SET DOWN IN THE PRESENT CONSTITUTION BY OUR FOREFATHERS, WHO HAVING PERSONALLY EXPERIENCED RELIGIOUS PERSECTUION IN THEIR NATIVE LANDS, FOUND THEMSELVES FORCED TO COME TO THIS LAND AS A RESULT OF THEIR FATHERS AND MOTHERS RELIGIOUS VIEWS WHICH WERE NOT THOSE HELD BY THE GOVERNMENT OF THEIR FORMER NATIONS.

WE IN THE UNITED CHURCH OF CHRIST BELIEVE THAT CHILDREN HAVE THE RIGHT TO PRAY PRESENTLY IN ANY PUBLIC SCHOOL OR PUBLIC PLACE. A CONSTITUTIONALLY MANDATED SCHOOL PRAYER, SILENT OR OTHERWISE, WILL PLACE THAT PRESENT RIGHT IN JEOPARDY.

THE TERM "VOLUNTARY" SHOULD BE ELIMINATED FROM ALL LEGISLATION FOR IT IS CLEAR THAT ANY STATE OR GOVERNMENT MANDATED SCHOOL PRAYER WOULD OR COULD NOT BE VOLUNTARY. IT WAS NOT VOLUNTARY PRIOR TO THE SUPREME COURT'S RULING IN 1971, NOR WOULD IT BE IF IT IS LEGISLATED IN THE 1980s.

AS CHRISTIANS WE IN THE UNITED CHURCH OF CHRIST FEEL STRONGLY THAT THE AIM OF EDUCATION IS TO FOSTER THE FULLEST POSSIBLE DEVELOPMENT OF THE PERSON'S CAPACITIES AS A HUMAN BEING CREATED BY GOD. BUT THIS RESPONSIBILITY FOR EDUCATION OF THE CHILD SHOULD BE SHARED BY PARENTS, THE CHURCH, AND THE GOVERNMENT. THEREFORE PARENTS, THE CHURCH AND GOVERNMENT ALL HAVE RIGHTFUL INTERESTS IN THE EDUCATION OF THE CHILD.

<u>THE RESPONSIBILITY FOR RELIGIOUS EDUCATION AND WORSHIP BELONGS PRIMARILY TO THE CHURCH AND THE HOME.</u>

DEVOTIONAL ACTIVITIES OR RELIGIOUS TEACHING DIRECTED TO RELIGIOUS COMMITMENT SHOULD NOT BE INCLUDED IN THE CURRICULUM OR PROGRAM OF THE PUBLIC SCHOOL. IN THE SETTING OF THE PUBLIC SCHOOL THERE IS NO SATISFACTORY WAY OF ESCAPING THE ASSOCIATION OF COMPULSION WITH SUCH TEACHING AND ACTIVITIES.

THE PEOPLE OF THE UNITED STATES HAVE VARIOUS RELIGIOUS LOYALTIES; PROTESTANT, ROMAN CATHOLIC, ORTHODOX, JEWISH, ETC. SOME ARE NOT ADHERENTS OF ANY RELIGIOUS BODY OR DO NOT PROFESS ANY RELIGIOUS BELIEFS. THIS RELIGIOUS PLURALISM CANNOT BE DISREGARDED IN FORMULATING POLICIES CONCERNING THE RELATION OF EDUCATION AND RELIGION IN PUBLIC SCHOOLS.

THE RELIGIOUS PLURALISM CHARACTERISTIC OF THE UNITED STATES AND THE DISAVOWAL OF SOCIETAL COMPULSION IN RELIGOUS ACTIVITIES AND OBSERVANCES HAVE UNDERMINED TRADITIONAL RELATIONS BETWEEN THE PUBLIC SCHOOL AND THE CHURCH IN MANY COMMUNITIES. THESE FACTS HAVE CONFRONTED BOTH THE CHURCH AND THE PUBLIC SCHOOL WITH THE NEED TO DEVISE NEW WAYS THROUGH WHICH THEIR RESPECTIVE RESPONSIBILITIES FOR THE DEVELOPMENT OF CHILDREN CAN BEST BE DISCHARGED.

SINCE THE DECISION OF THE SUPREME COURT IN 1971 DECLARING UNCONSTITUTIONAL CERTAIN RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS WHICH WERE FOR A LONG TIME SANCTIONED BY LAW AND CUSTOM, RAISED IMPORTANT QUESTIONS CONCERNING THE NATURE OF EDUCATION, AND THE RELATION OF PUBLIC SCHOOLS TO THE CHURCHES. AND SINCE THESE QUESTIONS ARE OF GREAT IMPORTANCE TO PARENTS AND CHILDREN AND TO THE CHURCHES, AS WELL AS THOSE IN GOVERNMENT CONCERNED WITH EDUCATION, THE UNITED CHURCH OF CHIRST HAS ENCOURAGED ITS MEMBERS TO PARTICIPATE IN EFFORTS TO STRENGTHEN AND IMPROVE PUBLIC EDUCATION THROUGH SUCH POSITIVE STEPS AS:

- KEEPING INFORMED ABOUT THE NEEDS OF THE PUBLIC SCHOOLS AND THE ISSUES RELATING TO PUBLIC EDUCATION AS A BASIS FOR INTELLIGENT ACTION AS CITIZENS;
- ENGAGING IN INTELLIGENT APPRAISAL AND RESPONSIBLE CRITICISM OF PROGRAMS OF PUBLIC EDUCATION;
- SUPPORTING QUALIFIED CANDIDATES FOR BOARDS OF EDUCATION AND BEING WILLING TO SERVE AS MEMBERS OF SUCH BOARDS;
- WORKING FOR IMPROVED FINANCIAL SUPPORT OF PUBLIC SCHOOLS;
- EMPHASIZING PUBLIC SCHOOL TEACHING AS A PROFESSION THROUGH WHICH THE CHRISTIAN CAN EXPRESS HIS CHRISTIAN VOCATION.

THE LOCAL CHURCH, AND INSTRUMENTALITIES SERVING UNITED CHURCH OF CHRIST CHURCHES, ARE ENCOURAGED TO EXPLORE AND DEVELOP WAYS TO PROVIDE CHILDREN OF SCHOOL AGE ADEQUATE OPPORTUNITIES FOR WORSHIP AND FOR

INSTRUCTION DIRECTED TOWARDS CHRISTIAN COMMITMENT. OUR CHRISTIAN EDUCATION PROGRAM SUPPORTED THROUGH OUR BOARD FOR HOMELAND MINISTRIES AND CARRIED ON BY OUR LOCAL CHURCHES IS SUPPORTED BY SUCH POSITIVE STEPS AS:

- ENCOURAGING MORE ADEQUATE PROVISIONS AND USE OF FACILITIES FOR CHRISTIAN EDUCATION;
- MORE AND BETTER QUALIFIED TEACHERS IN CHRISTIAN EUCATION ON BOTH PART-TIME OR FULL-TIME BASIS;
- ADEQUATE TEXTBOOKS AND OTHER TEACHING AIDS FOR ENLARGED PROGRAM OF CHRISTIAN EDUCATION
- IMPROVEMENT OF SUCH ESTABLISHED MEANS OF CHRISTIAN EDUCATION AS SUNDAY CHURCH SCHOOLS, CONFIRMATION INSTRUCTION, AND NEW MEMBERSHIP CLASSES, ALONG WITH NEW EXPERIMENTAL MODELS.

I CLOSE WITH A QUOTE FROM MATTHEW (22:21) "RENDER THEREFORE UNTO CAESAR THE THINGS WHICH ARE CAESAR'S: AND UNTO GOD THE THINGS THAT ARE GOD'S". THESE WORDS SHOULD NOT BE TAKEN LIGHTLY. PRAYER IS THE PROVIDENCE OF CHURCH AND HOME AND IS NOT A PROPER AREA FOR GOVERNMENT. OUR CONSTITUTION STATES "CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF." -U.S. CONSTITUTION, AMENDMENT 1.

THE UNITED CHURCH OF CHRIST BELIEVES THAT FOR THE UNITED STATES SENATE TO PASS ANY OF THE PRESENT LEGISLATION MANDATING PRAYER IN PUBLIC SCHOOLS, IT WOULD CREATE HAVOC AND COMPETITION WITH THOSE RELIGIOUS GROUPS WHO ON ONE HAND DOMINATE THE LIFE OF COMMUNITIES THROUGHOUT THE NATION AND THOSE WHO REPRESENT THE RELIGIOUS VIEWS OF THE MINORITY SEGMENT OF THOSE COMMUNITIES. WE THEREFORE WOULD BEGIN TO RE-CREATE IN THIS NATION THE CONDITIONS THAT FOSTER THE KIND OF RELIGIOUS PERSECUTION OF THOSE WITH THE FEWEST NUMBERS, OR THE LEAST RESOURCES.

STATEMENT FOR THE RECORD

BY THE LUTHERAN COUNCIL IN THE U.S.A.

ON S. J. RES. 2

This statement is submitted on behalf of three church bodies of the Lutheran Council in the U.S.A.:

* The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,900 congregations having approximately 2.4 million U.S. members;

* The Lutheran Church in America, headquartered in New York, New York, composed of 5,800 congregations having approximately 2.9 million members in the U.S., and

* The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 275 congregations having approximately 110,000 U.S. members.

These Lutheran church bodies maintain that the proposed constitutional amendment before this subcommittee, S.J.Res. 2, is unnecessary from a religious point of view and unwise from a public policy perspective. This amendment would allow "individual or group silent prayer or reflection" at all levels of public education.

In numerous past instances we have testified before Judiciary Committees of the House of Representatives and the United States Senate on the issue of vocal prayer amendments. Our opposition to these is expressed in the attached documents which we also submit for the record.

We must, however, oppose just as strenuously an effort to amend our Constitution allowing for "silent" prayer in public schools. This is an effort which proponents claim will return some form of prayer or religious practice to public schools.

Yet, it is impossible to "return" silent prayer to the schools; something cannot be returned that has not been removed. There has never been any judicial action, at the Supreme Court or any other level, removing silent prayer from the classroom--nor could there ever be. In the strictist Totalitarian regime no force of arms, no edict, no abuse of power could ever accomplish this. Why do we presume that this has taken place in our country? The empty rhetoric claiming that "God has been expelled from our public school classrooms," unfortunately espoused at the highest levels of government, is a theological insult to our Creator. God's involvement in the good things of

this world, including education, is dependent on love for us, not on government-sanctioned prayer in public schools or other public meeting places.

Today if a child wishes to bow in prayer, he or she is able to do so at any time of the school day. There is no need to set aside a special time during the day for "group silent prayer." This could only lead to mischief in cases where a strong-willed teacher could influence the type of prayer used, such as Christian, while remaining within the strict interpretation of the law by not encouraging "any particular form of prayer." A 1971 statement of the Church Council of the American Lutheran Church underlines this fact:

> We are free to pray in our own words to our own God. We are free to read the Bible in the version we prefer. We are protected against having to join in devotional exercises decreed by governmental authorities. We are free to pray in public and to read the Bible in public places. We cannot, however, force others to join us in such expressions of our religious faith.

The Supreme Court in its decision released on June 4th, 1985 (WALLACE, GOVERNOR OF ALABAMA, ET AL. v. JAFFREE ET AL.) declared unconstitutional the State of Alabama's "moment of silence" statute concerning school prayer. Of obvious importance was the fact that the Alabama law included the suggestion that children pray during a set time. It was an encouraging decision to all people concerned about government neutrality toward religion.

The purpose of prayer is to praise and petition God, not to serve the secular purpose of creating an ethical atmosphere for public school children. Prayer is communication with the Almighty which should change the person who prays--it must never be used to trivialize the faith of young children or provide some sort of religious imprimatur to public school education. It is far more than a pause before math class, or during homeroom. Thus, the intent in sponsoring public school prayer is vitally important, and the Lutheran churches resist any attempt by legislators or by school authorities to inject religious practices--whether spoken or silent--into the public school classroom in an effort to create a wholesome milieu for public school learning.

In the Jaffree decision Justice O'Connor wrote: "Nothing in the United States Constitution as interpreted by this Court...prohibits public school students from voluntarily praying at any time before, during, or after the school day." The only restrictions for voluntary prayer are interruptions of the educational process and the organization of groups or classes by officials of the public schools. Students can pray when they want, not when a school wants them to; can pray in the way they want, not as the school says; can pray where they want, not where the school demands. This is not anti-religious but strongly protective of our faith.

Justice Stevens, quoting Justice Jackson wrote in Jaffree: "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." He then concluded: "The State of Alabama, no less than the Congress of the United States, must respect that basic truth." It is this basic truth which would be undermined by the passage of S. J. Res. 2.

While we are concerned about government interference into the realm of religious expression we are also concerned about the quality of public school education. Our children's education is inadequate when it is premised either on indifference or antagonism to the religious elements in history, in community life or in the lives of individuals. The Supreme Court has ruled state-mandated prayer unconstitutional, it has not ruled out the study of religion in public schools. In this area, Lutherans see a positive challenge to interact with public school educators in order to develop programs which acknowledge the religious and moral dimensions of life while also respecting the larger religious neutrality mandated by the U.S. Constitution.

Continued efforts to establish human ideas of prayer into Godly public education have been properly addressed by the Supreme Court in a number of cases and in a variety of ways. These are decisions which the Lutheran Churches support. Our best reaction will be to strengthen our congregational worship services and pray together at home as families--while working against ill-conceived efforts to engage the government in the religious affairs of our young people.

PUBLIC SCHOOLS and RELIGIOUS PRACTICES

Statements made or supported by The American Lutheran Church on religion in the public schools, including school prayer and related concerns

- statement of ALC Church Council, June 1981
- testimony on School Prayer Amendment, August 1980
- statement of Church Council on Prayer Amendment, October 1971

I. Religion in the Public Schools

Adopted by the Church Council of The American Lutheran Church, 25 June 1981 (CC81.6.128), as a statement of comment and counsel to the member congregations of The ALC, in response to a request by the Tenth General Convention of The ALC, October 1980 (GC80.6.1).

A. Questions and Concerns

Various questions and concerns have arisen about the proper place for religion and religious expression in the public schools. Proposals favoring a constitutional amendment allowing schools to set aside time for prayer have been offered in Congress. Numerous communities have struggled with questions related to the inclusion of religious music in school programs.

Fundamental questions about the place of religion in the public schools are being asked. Must all observance of religious holidays in the schools be avoided? What is the meaning and ultimate effect of religious liberty in a pluralistic society? Does the Constitution require that *all* religious expressions be equally excluded from the public schools so that no one of them receives unfair advantage ("no establishment" clause of the First Amendment)? Or, does it require that all be given equal opportunity for expression ("free exercise" clause of the First Amendment)?

Still other questions call for serious attention. Can public schools conduct courses in moral education which may have content offensive to some

religious groups? Is secular humanism, a view of human life which affirms human values but excludes all considerations of God, really the *religious* perspective of the public schools? Does the public school function as the "established church" of American "civil religion?"

Such questions reflect the deep concern felt by many Christians as they attempt to deal with expressions of their religious heritage and commitments in ways appropriate to a pluralistic society and sensitive to the requirements of religious liberty.

B. Prescrib' ` Religious Exercises

Officially prescribed prayer and Bible-reading exercises in the school are essentially devotional in character and constitute an offense to religious liberty. The American Lutheran Church has declared that "reading of Scripture and addressing deity in prayer are forms of religious expression which devout persons cherish. To compel these religious exercises as essential parts of the public school program, however, is to infringe on the beliefs of religious persons as well as the rights of the irreligious." ("Church-State Relations in the U.S.A.," 1964)

Laws mandating "voluntary" prayer in the public schools are unnecessary since truly voluntary prayer is now possible.[1] Moreover, were the state to mandate such prayer, it would be no longer genuinely voluntary. We likewise oppose proposals which would strip the federal courts, including the Supreme Court, of jurisdiction to hear cases involving voluntary school prayer. Such proposals have raised serious questions of constitutionality, appearing to circumvent the constitutional safeguards concerning religious liberty.

Devotional exercises to cultivate and nurture the religious faith of young people do not belong in the schools but in the home and the church. Officially prescribed devotional exercises open the door to sectarian intrusion or to governmental prescription of an official faith.

C. Religious Elements in Public Education

While officially prescribed devotional exercises must be carefully excluded from public schools, it is important that our schools recognize the part that religion has played in the social and historical development of civilization and provide opportunity for the study of religion in accordance with the purposes of public education.

The American Lutheran Church has declared that "it is a distortion of the constitutional principle of neutrality of the state toward religion to insist that public schools ignore the influence of religion upon culture and persons. A rounded education ought to include knowledge of major

[1] "Testimony on School Prayer Amendment to S. 450"—see below.

religious groups and their emphases, the influence of religion upon the lives of people, and the contribution of religion to society, taught in history, literature, social science, and other courses at levels consistent with the maturity and comprehension of the pupils. The objective for the public schools in this direction is understanding rather than commitment, a teaching *about* religion rather than a teaching *of* religion. Churches ought to offer their assistance to the public schools in preparing for and in supporting the teaching of such courses." ("Church-State Relations in the U.S.A.," 1964)

This means that we uphold the freedom and responsibility of the schools to deal with the materials of heritage in a wholistic rather than truncated manner. For example, sacred or religious music ought not be excluded from school music programs. To do so would be to distort our cultural heritage. Moreover, to systematically exclude from the curriculum or from school programs all materials expressing religious themes would indirectly support secular humanism as the religious viewpoint of the public schools.

Discussion of religious holidays in the school should be for the purpose of educational objectives and not a matter of religious observance. If schools close to allow for observance of religious holidays, care should be taken to treat equitably all religious groups having a substantial numerical presence in the community.

D. Values Education

Schools unavoidably teach or transmit a whole range of values. Many such values are shared by an entire community and pose no special problems to public schools. When values of various persons or groups in a community are in conflict, however, public schools often find themselves caught in such conflict. It is not then the function of the schools to exalt one set of religiously-grounded values above another. Nor should the schools give the impression that values are simply a matter of personal preference, thereby promoting a view of moral relativity. Such approaches to questions of values are fundamentally inappropriate for public schools.

Christian parents and the churches must assume their rightful responsibility for communicating their religious commitments and values to their children. The distinctiveness of those commitments and values should be neither promoted nor undermined by the manner of religious expression in the public schools.

II. Testimony on School Prayer Amendment

Presented to Subcommittee on Courts, Civil Liberties, and the Administration of Justice (of the U.S. House Judiciary Committee), 19 August, 1980, by John R. Houck, general secretary of the Lutheran Council USA, on behalf of The American Lutheran Church, the Association of Evangelical Lutheran Churches, and the Lutheran Church in America.

My name is John R. Houck, and I serve as general secretary of the Lutheran Council in the U.S.A. I appreciate this opportunity to testify on the provisions of S450 which would prohibit the Supreme Court from reviewing state laws relating to voluntary prayer in the public schools and bar federal district courts from hearing such cases. I am testifying on behalf of three member church bodies of the Lutheran Council:

> The American Lutheran Church, headquartered in Minneapolis Minnesota, composed of 4,800 congregations having approximately 2.4 million U.S. members;
>
> The Lutheran Church in America, headquartered in New York, New York, composed of 6,100 congregations having approximately 2.9 million members in the U.S. and Canada; and
>
> The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 260 congregations having approximately 110,000 U.S. members.

The Lutheran church bodies I represent recognize the serious theological and public-policy difficulties which arise when government mandates religious exercises in public schools. Since the landmark decisions of the Supreme Court in 1962 and 1963 (Engel and Schempp cases, 370 U.S. 421 and 374 U.S. 203), these churches have consistently resisted legislative attempts to circumvent the Court's actions. This activity has not been undertaken lightly. Within these church bodies, serious consideration has been given to the school prayer issue by lay persons and members of the clergy, by individuals within our congregations and staff of regional and national church offices. The position I am presenting here has been determined in national conventions of the churches at which congregational representatives gather, and subsequent implementation has taken place according to the churches' constitutions and bylaws. We do not presume to say that the decisions of these conventions reflect the personal opinion of each and every member of these Lutheran church bodies; indeed, it is doubtful that any broadbased and inclusive institution could truly make this claim. However, these statements, which serve as the foundation for our corporate action, do represent the end result of an organized and democratic process which is acknowledged as legitimate by members of these church bodies.[1]

[1] ALC statements: "Prayer in the Public Schools," 1964; "Church-State Relations in the U.S.A." (1966); "Proposed Prayer Amendment and Our Cherished Religious Liberty" (1971); "Christian Concern for General Education" (1974).

Although the measure before this committee is focused on "voluntary prayer," I would like to share our common concerns about the broader questions raised in the public school prayer debate. Our position on school prayer reflects our theological presuppositions about prayer, an essential part of our religious life.

1. Questionable Religious Practice

From a purely religious perspective, we believe that prayers *in public schools* are not essential to the cultivation of religion in our youth. Prayer and religious readings in public school classrooms, even those which may reflect our own religious tradition, are often ritualistic in character, with dubious value either as an educational or religious experience. The church bodies I represent maintain that the nurture of religious faith belongs in the home and in the church, not in the public schools.

In addition to questioning the religious benefits of prayers in public school classrooms, Lutheran churches have serious theological reservations about

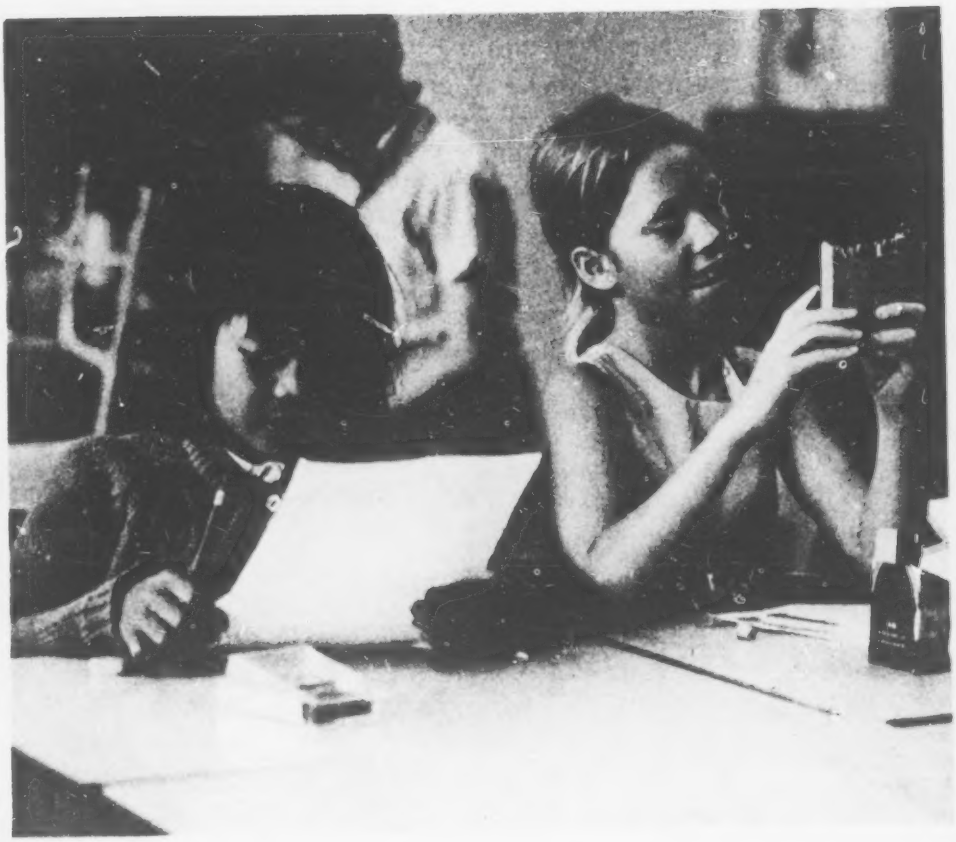
"nondenominational prayer" within this setting. The religious value of "sanitized prayers," as they have been described in earlier hearings before this committee, is questionable. Such prayers may even be objectionable since they may promote a religious experience which conveys none of the substance, the depth, or the cutting edge of our historic witness—or that of other faith groups.

We also object to "nondenominational prayers" which may uncritically mix nationalism and religion. As the Lutheran Church in America statement says so clearly, "the more we attempt as Christians or Americans to insist on common denominator religious exercise or instruction in public schools, the greater the risk we run of diluting our faith and contributing to a vague religiosity which defines religion with patriotism and becomes a national folk religion." Accepting as the norm in public schools "sanitized" prayer or nondenominational prayer reflecting a strong "civil religion" may seriously undermine parental direction of the religious experience of their children.

We believe that the purpose of prayer is to praise and petition God, not to serve the secular purpose of creating a moral or ethical atmosphere for public school children. Prayer is communication with God which may change the person who prays—but it is not a tool to be used to "christianize" or "moralize" public education. Thus, the intent in mandating public school prayer is vitally important, and the Lutheran churches I represent would resist any attempt by legislators or by school authorities to inject prayer into the public classroom in an effort to simply create a wholesome milieu for public school learning.

We perceive no need to "put God back into education" by mandating prayer in the classroom. As Lutherans in the U.S., we affirm the principle of "institutional separation and functional interaction" between church and government, and recognize the distinctive calling and sphere of activity of each institution. However, we believe that God is active and powerful in all human affairs and operates through human institutions which maintain peace, establish justice, protect and advance human rights, and promote the general welfare of all persons—proper concerns of the government. God's involvement in the good things of his creation, including education, is dependent on his love for us, not on government mandated prayer in public schools or other public buildings.

However, we are concerned about the quality of public school education and understand it to be inadequate when it is premised either on indifference or antagonism to the religious elements in history, in community life, or in the lives of individuals. We strongly object to policies which would make the *de facto* creed of public schools a secularism which would be inimicable to religious beliefs. Maintaining a wholesome neutrality among all kinds of religions—whether theistic or non-theistic in



character—is a difficult but essential task for the community. While the Supreme Court has ruled state-mandated prayer unconstitutional, it has not ruled out the *study* of religion in public schools. In this area, Lutherans see a positive challenge to interact with public school educators in order to develop programs which acknowledge the religious and moral dimensions of life while also respecting the larger religious neutrality mandated by the Constitution.

2. Questionable Public Policy

We have stated our position that, from our religious viewpoint, prayer in public schools is of dubious value in instilling virtues or in creating a "moral atmosphere" for school children. From a public-policy perspective, we also recognize the serious difficulties which this practice creates in terms of the religious rights of individuals and the welfare of the community as a whole.

The Lutheran church bodies I represent acknowledge that the historical situation in the United States has changed since the early days of the Republic when underlying religious beliefs were assumed. The influx of new immigrants, with varying traditions and creeds, and a range of

other historical circumstances has contributed to a society which is thoroughly pluralistic. The Lutheran churches view this situation as a challenge and not a threat—a challenge to articulate clearly the tenets of our faith in this pluralistic culture rather than cling to practices which may have been appropriate at an earlier stage in our nation's development but which need re-evaluation in the light of historical change. Public school prayer is one of those practices.

As Lutherans in the U.S., we cherish the guarantees of religious liberty which were written into the Constitution. We affirm the fact that the government safeguards the rights of all persons and groups in our society to the free exercise of their religious beliefs and makes no decisions regarding the validity or orthodoxy of any doctrine. These religious freedoms are guaranteed to all, to members of traditional religious groups, nonconformists and nonbelievers. We recognize that, given our pluralistic culture, religious exercise in public schools may infringe on the rights of some individuals and groups in society and invite sectarian divisiveness in the community.

The following Lutheran Church in America statement, reaffirmed in July of 1980 by representatives of the congregations gathered in convention in Seattle, discusses the public policy implications of this situation:

> A due regard for all religious faiths and also for nonbelievers and nonconformists of all kinds makes it imperative that the public schools abstain from practices that run the risk of intrusion of sectarian elements and divisiveness. The public schools serve a unique and valued place in helping to build a civic unity despite the diversities of our pluralistic culture. It should be noted that when the state deeply involves itself in religious practices in the public schools, it is thereby not only appropriating a function properly served by the church and the family, but subjecting the freedom of believers and unbelievers alike to the restraint that accompanies the use of governmental power and public facilities in the promotion of religious ends.

The changes mandated by the 1962-63 Supreme Court decisions should be understood in a positive, rather than a negative light by those concerned about religious freedoms. A 1971 American Lutheran Church statement affirming these decisions expresses this sentiment and focuses on the freedoms protected by the Court rather than the restrictions posed:

> We are free to pray in our own words to our own God. We are free to read the Bible in the version we prefer. We are protected against having to join in devotional exercises decreed by the governmental authorities. We are free to pray in public and to read the Bible in public places. We cannot, however, force others to join us in such expressions of our religious faith. These freedoms and these protections our Constitution, as interpreted by the Supreme Court in its school prayer and Bible reading decisions, presently assures us.

For both theological and public-policy reasons, the Lutheran churches I represent have consistently supported the changes in practice which were mandated by the Supreme Court's 1962-1963 decisions. Understanding our theological and public-policy concerns about the broader school prayer issue is essential to understanding our position on the specific provision of S450 which is being considered by this committee.

3. What Is "Voluntary Prayer"?

This proposal deals with "voluntary prayer" in public schools classrooms and public buildings. I would like to again express our understanding, and that of many other groups testifying here, that the Supreme Court has *not* prohibited voluntary prayer in schools—indeed, there is no way it could ban personal communication between an individual and God. Neither has it outlawed the inclusion of a moment of silence for meditation or prayer in the school day or forbidden children from reading the Bible or praying aloud in schools. What has not stood up to judicial scrutiny are prayer sessions *mandated by law or organized by school officials*—even if participation would be, in one manner or another, optional.

The question of just what comprises voluntary prayer is central to this issue. The Lutheran churches, like the courts, have questioned whether school-organized prayer sessions can be completely "voluntary." Children attending public schools are there under compulsion of public law. Public school facilities are used, and the teachers—symbols of authority in the classroom—may supervise the exercise. As the Lutheran Church in America statement cited above says,

> These factors combine to operate with indirect coercive force on young and impressionable children to induce them to take part in these exercises, despite freedom to be excused from participation. Even persons with a genuine regard for prayer and the Bible may object to having their children engage in these exercises when they are supported by the compulsion of law.

In earlier testimony, this committee has heard representatives of religious organizations differ among themselves as to what type of "voluntary prayer" would be acceptable from their religious perspective. Some would find *inter*denominational prayer acceptable, while others would insist on *non*-denominational prayer; yet others would find either practice unsuitable. To deal with these religious differences, several have suggested that "community standards" be the means for determining actual practice in the public schools. However, the "community standard" argument ignores the reality and the depth of these religious differences, especially as they regard minority groups, and does not seriously weigh the fundamental constitutional questions involved in this practice. Religious differences, even among advocates of school prayer, will surely find expression in diverse practices which could result in separate com-

munities experiencing a greater or lesser degree of religious freedom. Individual states making final determinations on the school prayer issue could lead to a "patchwork quilt" of interpretations as to what the First Amendment to the Constitution means in practice.

The school prayer amendment to S450 could, in effect, set aside a nationwide standard for religious freedoms guaranteed by the Constitution and interpreted by the Supreme Court. We strongly maintain that the standard for determining which laws provide for truly "voluntary prayer" in public schools and which actually violate the First Amendment should be uniform throughout the United States. Thus, we maintain that hearing cases involving voluntary prayers in public schools is not just a state issue, but is properly within the jurisdiction of the Supreme Court.

The precedent this legislation could set makes it transcend the public-policy implications of permitting prayer in public schools; it touches upon the proper relationship between Congress and the Supreme Court and also between the states and the federal government. Other witnesses who have testified before this committee have discussed in detail the serious constitutional questions this measure raises, questions involving the separation of powers and congressional attempts to limit Supreme Court jurisdiction on specific issues involving constitutional rights. Some have described the school prayer amendment as a "backdoor" way of amending the Constitution, one which would bypass accepted procedures in an attempt to sanction certain practices likely to be ruled unconstitutional if reviewed by the Supreme Court.

If it is the wish of Congress to clarify the 1963 Supreme Court ruling for local school boards or districts, the prayer amendment to S450 is an inappropriate and perhaps even unconstitutional method to employ. If implemented, this legislation could create new problems of interpretation and could lead to unsuspected results in areas vitally touching on religious liberty. Besides opening the door to divisiveness in the community, it could prove to be the forerunner of other attempts to circumvent the decisions of the Supreme Court on key issues. It would be possible for Congress to follow the precedent set by this bill and remove from the jurisdiction of the Court other practices which could more fundamentally threaten religious liberty and infringe upon constitutional rights.

In an election year, it may seem politically desirable to approve what may be popularly perceived as a "vote for morality and prayer." However, we perceive the prayer amendment to S450 as unnecessary from a religious point of view and unwise from a public policy perspective. On behalf of The American Lutheran Church, the Lutheran Church in America and the Association of Evangelical Lutheran Churches, I urge you to reject this measure.

III. Proposed Prayer Amendment and Our Cherished Religious Liberty

Adopted October 22, 1971, by the Church Council, the legislative agency between general conventions, of The American Lutheran Church, by a vote of 40 in favor, none against, and no abstentions, with four members absent. (C70.10.173).

The guarantees of religious liberty written into the Constitution of the United States have served this nation well. Both church and state are the stronger because government cannot pass laws "respecting an establishment of religion or prohibiting the free exercise thereof."

As American Lutherans we cherish the freedom and the responsibility the First Amendment assures us. We cherish our freedom to pray, to assemble, to worship, to study, to teach, and to serve our neighbors as the fullness of our faith directs. We respect the similar freedoms and responsibilities of our neighbors of other religious faiths. We do not seek to impose our understandings upon them; we expect the same consideration from them.

By its very nature, religious expression is both personal and corporate. It cannot be forced or coerced. It must be true to its distinctive self and to its own corporate commitment. It resists becoming the captive of any race, class, ideology, or government, lest it lose its loyalty to its Lord.

This protection we enjoy in America. We are free to pray in our own words to our own God. We are free to read the Bible in the version we prefer. We are protected against having to speak governmentally composed prayers. We are protected against having to join in devotional exercises decreed by governmental authorities. We are free to pray in public and to read the Bible in public places. We cannot, however, force others to join us in such expressions of our religious faith. These freedoms and these protections our Constitution, as interpreted by the Supreme Court in its school prayer and Bible reading decisions, presently assures us.

We see no need, therefore, for any amendment to the Constitution to permit participation in "nondenominational prayer" "in any public building." Such an amendment would endanger our religious liberty; it would tend to establish a governmental nondenominational religion; it would pave the way for courts to intervene in defining what is acceptable as an expression of religion; and it would limit rights already granted and clearly established in American life.

The Church Council in 1971 reaffirms the paragraph commended by the 1964 General Convention and adopted by the 1966 General Convention

"as an expression of the policy and conviction of The American Lutheran Church":

> Reading of Scripture and addressing deity in prayer are forms of religious expression which devout persons cherish. To compel these religious exercises as essential parts of the public school program, however, is to infringe on the distinctive beliefs of religious persons as well as on the rights of the irreligious. We believe that freedom of religion is best preserved when Scripture reading and prayer are centered in home and church, their effects in the changed lives of devout persons radiating into the schools and into every area of community life. It is as wrong for the public schools to become agents for atheism, godless secularism, scoffing irreligion, or a vague "religion in general" as it is for them to make religious rites and ceremonies an integral part of their programs.

As a nation we should be careful not to endanger our cherished religious liberty through the well-intended but potentially harmful "prayer amendment" (House Joint Resolution 191).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83–812. Argued December 4, 1984—Decided June 4, 1985*

In proceedings instituted in Federal District Court, appellees challenged the constitutionality of, *inter alia*, a 1981 Alabama Statute (§ 16–1-20.1) authorizing a 1-minute period of silence in all public schools "for meditation or voluntary prayer." Although finding that § 16–1-20.1 was an effort to encourage a religious activity, the District Court ultimately held that the Establishment Clause of the First Amendment does not prohibit a State from establishing a religion. The Court of Appeals reversed.

Held: Section 16–1-20.1 is a law respecting the establishment of religion and thus violates the First Amendment. Pp. 9–23.

(a) The proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does Congress is firmly embedded in constitutional jurisprudence. The First Amendment was adopted to curtail Congress' power to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience, and the Fourteenth Amendment imposed the same substantive limitations on the States' power to legislate. The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. Moreover, the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Pp. 9–16.

(b) One of the well-established criteria for determining the constitutionality of a statute under the Establishment Clause is that the statute must have a secular legislative purpose. *Lemon* v. *Kurtzman*, 403

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*Together with No. 83–929, *Smith et al.* v. *Jaffree et al.*, also on appeal from the same court.

Syllabus

U. S. 602, 612–613. The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. Pp. 16–18.

(c) The record here not only establishes that § 16–1-20.1's purpose was to endorse religion, it also reveals that the enactment of the statute was not motivated by any clearly secular purpose. In particular, the statements of § 16–1-20.1's sponsor in the legislative record and in his testimony before the District Court indicate that the legislation was solely an "effort to return voluntary prayer" to the public schools. Moreover, such unrebutted evidence of legislative intent is confirmed by a consideration of the relationship between § 16–1-20.1 and two other Alabama statutes—one of which, enacted in 1982 as a sequel to § 16–1-20.1, authorized teachers to lead "willing students" in a prescribed prayer, and the other of which, enacted in 1978 as § 16–1-20.1's predecessor, authorized a period of silence "for meditation" only. The State's endorsement, by enactment of § 16–1-20.1, of prayer activities at the beginning of each school day is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion. Pp. 16–23.

705 F. 2d 1526 and 713 F. 2d 614, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. O'CONNOR, J., filed an opinion concurring in the judgment. BURGER, C. J., and WHITE and REHNQUIST, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

83–812 *v.*

ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS

83–929 *v.*

ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation";[1] (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16–1–20.2, enacted in

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[1] Alabama Code § 16–1–20 (Supp. 1984) reads as follows:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

Appellees have abandoned any claim that § 16–1–20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16–1–20.1 (Supp. 1984) provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."[3]

At the preliminary-injunction stage of this case, the District Court distinguished § 16–1–20 from the other two statutes. It then held that there was "nothing wrong" with § 16–1–20,[4] but that § 16–1–20.1 and 16–1–20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity."[5] After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.[6]

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both §§ 16–1–20.1 and 16–1–20.2, and held them both unconstitutional.[7] We have

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shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3] Alabama Code § 16–1–20.2 (Supp. 1984) provides:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

"Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen."

[4] The court stated that it did not find any potential infirmity in § 16–1–20 because "it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness." *Jaffree* v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982).

[5] *Ibid.*

[6] *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104, 1128 (SD Ala. 1983).

[7] *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535–1536 (CA11 1983).

already affirmed the Court of Appeals' holding with respect to § 16–1–20.2.[8] Moreover, appellees have not questioned the holding that § 16–1–20 is valid.[9] Thus, the narrow question for decision is whether § 16–1–20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.[10]

I

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint named members of the Mobile County School Board, various school officials, and the minor plaintiffs' three teachers as defendants.[11] The complaint alleged that the appellees brought the action "seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution."[12] The complaint further alleged that two of the children had been subjected to various acts of religious indoctrination "from the beginning of the school year in September, 1981";[13] that the defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison;[14] that the

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[8] *Wallace* v. *Jaffree*, 466 U. S. —— (1984).

[9] See n. 1, *supra*.

[10] The Establishment Clause of the First Amendment, of course, has long been held applicable to the States. *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947).

[11] App. 4–7.

[12] *Id.*, at 4.

[13] *Id.*, at 7.

[14] *Ibid.*

minor children were exposed to ostracism from their peer group class members if they did not participate;[15] and that Ishmael Jaffree had repeatedly but unsuccessfully requested that the devotional services be stopped. The original complaint made no reference to any Alabama statute.

On June 4, 1982, appellees filed an amended complaint seeking class certification,[16] and on June 30, 1982, they filed a second amended complaint naming the Governor of Alabama and various State officials as additional defendants. In that amendment the appellees challenged the constitutionality of three Alabama statutes: §§ 16–1–20, 16–1–20.1, and 16–1–20.2.[17]

On August 2, 1982, the District Court held an evidentiary hearing on appellees' motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the "prime sponsor" of the bill that was enacted in 1981 as § 16–1–20.1.[18] He explained that the bill was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction."[19] Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had "no other purpose in mind."[20] A week after the hearing, the District Court entered a preliminary injunction.[21] The court held that appellees were likely to prevail on the merits because the enactment of §§ 16–1–20.1 and 16–1–20.2 did not reflect a clearly secular purpose.[22]

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[15] *Id.*, at 8–9.

[16] *Id.*, at 17.

[17] *Id.*, at 21. See nn. 1, 2, and 3, *supra*.

[18] *Id.*, at 47–49.

[19] *Id.*, at 50.

[20] *Id.*, at 52.

[21] *Jaffree* v. *James*, 544 F. Supp. 727 (SD Ala. 1982).

[22] See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). Insofar as relevant to the issue now before us, the District Court explained:

"The injury to plaintiffs from the possible establishment of a religion by the State of Alabama contrary to the proscription of the establishment

In November 1982, the District Court held a four-day trial on the merits. The evidence related primarily to the 1981–1982 academic year—the year after the enactment of § 16–1–20.1 and prior to the enactment of § 16–1–20.2. The District Court found that during that academic year each of the minor plaintiffs' teachers had led classes in prayer activities, even after being informed of appellees' objections to these activities.[23]

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the

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clause outweighs any indirect harm which may occur to defendants as a result of an injunction. Granting an injunction will merely maintain the status quo existing prior to the enactment of the statutes.

. . . . .

"The purpose of Senate Bill 8 [§ 16–1–20.2] as evidenced by its preamble, is to provide for a prayer that may be given in public schools. Senator Holmes testified that his purpose in sponsoring § 16–1–20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country. *See* Alabama Senate Journal 921 (1981). The Fifth Circuit has explained that 'prayer is a primary religious activity in itself. . . .' *Karen B.* v. *Treen*, 653 F. 2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools. *Abington School District* v. *Schempp*, [374 U. S. 203, 224] (1963). Since these statutes do not reflect a clearly secular purpose, no consideration of the remaining two-parts of the *Lemon* test is necessary.

"The enactment of Senate Bill 8 [§ 16–1–20.2] and § 16–1–20.1 is an effort on the part of the State of Alabama to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion. *Engle* v. *Vitale*, [370 U. S. 421, 430] (1962). Thus, binding precedent which this Court is under a duty to follow indicates the substantial likelihood plaintiffs will prevail on the merits." 544 F. Supp., at 730–732.

[23] The District Court wrote:

"Defendant Boyd, as early as September 16, 1981, led her class at E. R. Dickson in singing the following phrase:

"'God is great, God is good,'

"'Let us thank him for our food,

"'bow our heads we all are fed,

"'Give us Lord our daily bread.

Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion."[24] In a separate opinion, the District Court dismissed appellees' challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court's dismissal of this challenge was

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"'Amen!'

"The recitation of this phrase continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

"'God is great, God is good,

"'Let us thank him for our food.'

"Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

"'Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.'

"The recitation of these phrases continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Ms. Green admitted that she frequently leads her class in singing the following song:

"'For health and strength and daily food, we praise Thy name, Oh Lord.'

"This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song." *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp., at 1107–1108.

[24] *Id.*, at 1128.

also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.[25]

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. The Court of Appeals noted that this

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[25] *Jaffree* v. *James*, 554 F. Supp. 1130, 1132 (SD Ala. 1983). The District Court's opinion was announced on January 14, 1983. On February 11, 1983, JUSTICE POWELL, in his capacity as Circuit Justice for the Eleventh Circuit, entered a stay which in effect prevented the District Court from dissolving the preliminary injunction that had been entered in August 1982. JUSTICE POWELL accurately summarized the prior proceedings:

"The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence 'for meditation or voluntary prayer' at the commencement of each day's classes in the public elementary schools. Ala. Code § 16–1–20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

"Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was 'obligated to enjoin the enforcement' of the statutes, *id.*, at 733.

"In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that Clause had been construed by this Court. The District Court nevertheless ruled 'that the United States Supreme Court has erred.' *Id.*, at 1128. It therefore dismissed the complaint and dissolved the injunction.

"There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engle* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *Abington School District* v. *Schempp*, 374

Court had considered and had rejected the historical arguments that the District Court found persuasive, and that the District Court had misapplied the doctrine of *stare decisis*.[26] The Court of Appeals then held that the teachers' religious activities violated the Establishment Clause of the First Amendment.[27] With respect to § 16–1–20.1 and § 16–1–20.2, the Court of Appeals stated that "both statutes advance and encourage religious activities."[28] The Court of Appeals then quoted with approval the District Court's finding that § 16–1–20.1, and § 16–1–20.2, were efforts "'to encourage a religious activity. Even though these statutes are permissive in

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U. S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

"Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them." *Jaffree* v. *Board of School Commissioners of Mobile County*, 459 U. S. 1314, 1314–1316 (1983).

[26] The Court of Appeals wrote:

"The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court. *See* 20 Am. Jur. 2d *Courts* § 183 (1965).

"Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto* v. *Davis*, [454 U. S. 370, 375] (1982) . . . . Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' *Davis*, [454 U. S. at 375]. *See Also*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, [460 U. S. 533, 535] (1983) (the Supreme Court, in a per curiam decision, recently stated: 'Needless to say, only this Court may overrule one of its precedents')." *Jaffree* v. *Wallace*, 705 F. 2d, at 1532.

[27] *Id.*, at 1533–1534. This Court has denied a petition for a writ of certiorari that presented the question whether the Establishment Clause prohibited the teachers' religious prayer activities. *Board of School Commissioners of Mobile County, Alabama* v. *Jaffree*, 466 U. S. —— (1984).

[28] 705 F. 2d, at 1535.

form, it is nevertheless state involvement respecting an establishment of religion.'"[28] Thus, the Court of Appeals concluded that both statutes were "specifically the type which the Supreme Court addressed in *Engle* [v. *Vitale*, 370 U. S. 421 (1962)]."[29]

A suggestion for rehearing en banc was denied over the dissent of four judges who expressed the opinion that the full court should reconsider the panel decision insofar as it held § 16–1–20.1 unconstitutional.[30] When this Court noted probable jurisdiction, it limited argument to the question that those four judges thought worthy of reconsideration. The judgment of the Court of Appeals with respect to the other issues presented by the appeals was affirmed. *Wallace* v. *Jaffree*, 466 U. S. —— (1984).

II

Our unanimous affirmance of the Court of Appeals' judg-

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[28] *Ibid.*

[29] *Ibid.* After noting that the invalidity of § 16–1–20.2 was aggravated by "the existence of a government composed prayer," and that the proponents of the legislation admitted that that section "amounts to the establishment of a state religion," the court added this comment on § 16–1–20.1:

"The objective of the meditation or prayer statute (Ala. Code § 16–1–20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. *James*, 544 F. Supp. at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn. 1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16–1–20.1 in violation of the establishment clause." *Id.*, at 1535–1536.

[30] *Jaffree* v. *Wallace*, 713 F. 2d 614 (CA11 1983) *(per curiam)*.

ment concerning § 16–1–20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.[32] Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[33] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[34]

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[32] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[33] See *Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 609 (1845).

[34] See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (right to refuse endorsement of an offensive state motto); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (right to free speech); *Board of Education* v. *Barnette*, 319 U. S. 624, 637–638 (1943) (right to refuse to participate in a ceremony that offends one's conscience); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (right to proselytize one's religious faith); *Hague* v.

Writing for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), Justice Roberts explained:

> ". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First

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CIO, 307 U. S. 496, 519 (1939) (opinion of Stone, J.) (right to assemble peaceably); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (right to publish an unpopular newspaper); *Whitney* v. *California*, 274 U. S. 357, 373 (Brandeis, J., concurring) (right to advocate the cause of communism); *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting) (right to express an unpopular opinion); cf. *Abington School District* v. *Schempp*, 374 U. S. 203, 215, n. 7 (1963), where the Court approvingly quoted *Board of Education* v. *Minor*, 23 Ohio St. 211, 253 (1872), which stated:

"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

Amendment.[35] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

> "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 637.
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> . . . . .
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> "The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that 'a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority

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[35] For example, in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court wrote:

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings."

See also *Widmar* v. *Vincent*, 454 U. S. 263, 269 (1981) (stating that religious worship and discussion "are forms of speech and association protected by the First Amendment").

> under powers committed to any political organization under our Constitution.' 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' *Id.*, at 642." *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977).

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism.[*] But when the underlying princi-

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[*] Thus Joseph Story wrote:

"Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 593 (1851) (footnote omitted).

In the same volume, Story continued:

ple has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[37] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the

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"The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; *but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion*, which had been trampled upon almost from the days of the Apostles to the present age. . . ." *Id.*, § 1877, at 594 (emphasis supplied).

[37] Thus, in *Everson* v. *Board of Education*, 330 U. S., at 15, the Court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

Id., at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Abington School District* v. *Schempp*, 374 U. S., at 216 ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

product of free and voluntary choice by the faithful,[*] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[*] As

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[*] In his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

. . . . .

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" The Complete Madison 299–301 (S. Padover ed. 1953).

See also *Engel* v. *Vitale*, 370 U. S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance").

[*] As the *Barnette* opinion explained, it is the teaching of history, rather than any appraisal of the quality of a State's motive, that supports this duty to respect basic freedoms:

Justice Jackson eloquently stated in *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

III

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), we wrote:

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." 319 U. S., at 640–641.

See also *Engel* v. *Vitale*, 370 U. S., at 431 ("a union of government and religion tends to destroy government and to degrade religion").

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [v. *Tax Commission*, 397 U. S. 664, 674 (1970)]."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.[40] For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, *e. g.*, *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 296–303 (1963) (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.[41]

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[42] In this case, the answer to that

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[40] See *supra*, n. 22.

[41] See *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984); *id.*, at —— (O'CONNOR, J., concurring); *id.*, at —— (BRENNAN, J., joined by MARSHALL, BLACKMUN and STEVENS, JJ., dissenting); *Mueller* v. *Allen*, 463 U. S. 388, ———— (1983); *Widmar* v. *Vincent*, 454 U. S., at 271; *Stone* v. *Graham*, 449 U. S. 39, 40–41 (1980) *(per curiam)*; *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977).

[42] *Lynch* v. *Donnelly*, 465 U. S., at —— (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16–1–20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

IV

The sponsor of the bill that became § 16–1–20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools.[43] Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind."[44] The State did not present

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[43] The statement indicated, in pertinent part:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer* to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard *on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.*" App. 50 (emphasis added).

[44] *Id.*, at 52. The District Court and the Court of Appeals agreed that the purpose of § 16–1–20.1 was "an effort on the part of the State of Alabama to encourage a religious activity." *Jaffree* v. *James*, 544 F. Supp., at 732; *Jaffree* v. *Wallace*, 705 F. 2d, at 1535. The evidence presented to the District Court elaborated on the express admission of the Governor of Alabama (then Fob James) that the enactment of § 16–1–20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity," compare Second Amended Complaint ¶ 32(d) (App. 24–25) with Governor's Answer to § 32(d) (App. 40); and that the "expressed legislative purpose in enacting Section 16–1–20.1 (1981) was to 'return voluntary prayer to public schools,'" compare Second Amended Complaint ¶¶ 32(b) and (c) (App. 24) with Governor's Answer to ¶¶ 32(b) and (c) (App. 40).

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evidence of *any* secular purpose.[45]

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16–1–20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences

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[45] Appellant Governor George C. Wallace now argues that § 16–1–20.1 "is best understood as a permissible accommodation of religion" and that viewed even in terms of the *Lemon* test, the "statute conforms to acceptable constitutional criteria." Brief for Appellant Wallace 5; see also Brief for Appellants Smith et al. 39 (§ 16–1–20.1 "accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected"), *id.*, at 47. These arguments seem to be based on the theory that the free exercise of religion of some of the State's citizens was burdened before the statute was enacted. The United States, appearing as *amicus curiae* in support of the appellants, candidly acknowledges that "it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day." Brief for United States as *Amicus Curiae* 10. There is no basis for the suggestion that § 16–1–20.1 "is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere." *Id.*, at 11. In this case, it is undisputed that at the time of the enactment of § 16–1–20.1 there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause. See, *e. g.*, *Thomas* v. *Review Board, Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Abington School District* v. *Schempp*, 374 U. S., at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs"). What was missing in the appellants' eyes at time of the enactment of § 16–1–20.1—and therefore what is precisely the aspect that makes the statute unconstitutional—was the State's endorsement and promotion of religion and a particular religious practice.

between § 16–1–20.1 and its 1978 predecessor, § 16–1–20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

There are only three textual differences between § 16–1–20.1 and § 16–1–20: (1) the earlier statute applies only to grades one through six, whereas § 16–1–20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16–1–20.1 uses the word "may"; (3) the earlier statute refers only to "meditation" whereas § 16–1–20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981–1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16–1–20 continued to apply to grades one through six.[46] Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.[47] Appellants have not identified any secular purpose that was not fully served by § 16–1–20 before the enactment of § 16–1–20.1. Thus, only two conclusions are consistent with the text of § 16–1–20.1: (1) the statute was enacted to convey a message of State endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[48]

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[46] See n. 1, *supra*.

[47] Indeed, for some persons meditation itself may be a form of prayer. B. Larson, Larson's Book of Cults 62–65 (1982); C. Whittier, Silent Prayer and Meditation in World Religions 1–7 (Cong. Research Service 1982).

[48] If the conclusion that the statute had no purpose were tenable, it would remain true that *no purpose* is not a *secular purpose*. But such a

We must, therefore, conclude that the Alabama Legislature intended to change existing law[49] and that it was motivated by the same purpose that the Governor's Answer to the Second Amended Complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The Legislature enacted § 16–1–20.1 despite the existence of § 16–1–20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.[50]

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political major-

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conclusion is inconsistent with the common-sense presumption that statutes are usually enacted to change existing law. Appellants do not even suggest that the State had no purpose in enacting § 16–1–20.1.

[49] *United States* v. *Champlin Refining Co.*, 341 U. S. 290, 297 (1951) (a "statute cannot be divorced from the circumstances existing at the time it was passed"); *id.*, at 298 (refusing to attribute pointless purpose to Congress in the absence of facts to the contrary); *United States* v. *National City Lines, Inc.*, 337 U. S. 78, 80–81 (1949) (rejecting Government's argument that Congress had no desire to change law when enacting legislation).

[50] See, *e. g.*, *Stone* v. *Graham*, 449 U. S., at 42 *(per curiam)*; *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Epperson* v. *Arkansas*, 393 U. S. 97, 109 (1968); *Abington School District* v. *Schempp*, 374 U. S., at 215–222; *Engel* v. *Vitale*, 370 U. S., at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S 203, 211–212 (1948); *Everson* v. *Board of Education*, 330 U. S., at 18.

ity.[51] For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion."[52] The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16–1–20.1 was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practi-

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[51] As this Court stated in *Engel* v. *Vitale*, 370 U. S., at 430:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

Moreover, this Court has noted that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.*, at 431. This comment has special force in the public-school context where attendance is mandatory. Justice Frankfurter acknowledged this reality in *McCollum* v. *Board of Education*, 333 U. S. 203, 227 (1948) (concurring opinion):

"That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

See also *Abington School District* v. *Schempp*, 374 U. S., at 290 (BRENNAN, J., concurring); cf. *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). Further, this Court has observed:

"That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Board of Education* v. *Barnette*, 319 U. S., at 637.

[52] *Lynch* v. *Donnelly*, 465 U. S., at —— (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion").

cal significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,"[53] we conclude that § 16–1–20.1 violates the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[53] *Id.*, at ——.

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16–1—20.1 violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a

[1] The three statutes are Ala. Code § 16–1–20 (Supp. 1984) (moment of silent meditation); Ala. Code § 16–1–20.1 (Supp. 1984) (moment of silence for meditation or prayer); and Ala. Code § 16–1–20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16–1–20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16–1–20.2 is invalid. *Wallace* v. *Jaffree*, —— U. S. —— (1984). Thus, our opinions today address only the validity of § 16–1–20.1. See *ante*, at 3.

[2] JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer:

suggestion set forth in the Court's opinion as well. *Ante*, at 20.

I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test.[3] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1972), identifies stand-

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"A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, 374 U. S., at 281 (BRENNAN, J., concurring) ("The observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); L. Tribe, American Constitutional Law, § 14–6, at 829 (1978); P. Freund, "The Legal Issue," in Religion in the Public Schools 23 (1965); Choper, *supra*, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."

Post, at 6–7 (O'CONNOR, J., concurring in the judgment).

[3] JUSTICE O'CONNOR asserts that the "standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Post*, at 2–3 (O'CONNOR, J., concurring). JUSTICE REHNQUIST would discard the *Lemon* test entirely. *Post*, at 23 (REHNQUIST, J., dissenting).

As I state in the text, the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1972. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*. See *Garcia* v. *San Antonio Metro. Transit Auth.*, —— U. S. ——, —— (1985) (POWELL, J., dissenting) ("The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents . . . .").

ards that have proven useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*, *supra*, have we addressed an Establishment Clause issue without resort to its three-pronged test. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).[4] *Lemon*, *supra*, has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis.[5]

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." *Lemon* v. *Kurtzman*, *supra*, at 612 (1971). As JUSTICE O'CONNOR recognizes, this secular purpose must be "sincere"; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a "sham." *Post*, at 10 (O'CONNOR, J., concurring in the judgment). In *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, for example, we held that a statute requiring the posting of the Ten Commandments in

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[4] In *Marsh* v. *Chambers*, 463 U. S. 783 (1983), we held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. Our holding was based upon the historical acceptance of the practice, that had become "part of the fabric of our society." *Id.*, at ——.

[5] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1972), was a carefully considered opinion of the Chief Justice, in which he was joined by six other Justices. *Lemon*'s three-pronged test has been repeatedly followed. In *Comm. of Public Education* v. *Nyquist*, 413 U. S. 756 (1974), for example, the Court applied the "now well defined three part test" of *Lemon*. *Id.*, at ——.

In *Lynch* v. *Donnelley*, —— U. S. —— (1984), we said that the Court is not "confined to any single test or criterion in this sensitive area." *Id.*, at ——. The decision in *Lynch*, like that in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), was based primarily on the long historical practice of including religious symbols in the celebration of Christmas. Nevertheless, the Court, without any criticism of *Lemon*, applied its three-pronged test to the facts of that case. It focused on the "question whether there is a secular purpose for [the] display of the crèche." *Id.*, at ——.

public schools violated the Establishment Clause, even though the Kentucky legislature asserted that its goal was educational. We have not interpreted the first prong of *Lemon*, *supra*, however, as requiring that a statute have "exclusively secular" objectives.[6] *Lynch* v. *Donnelley*, —— U. S. ——, —— n. 6. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (New York's property tax exemption for religious organizations upheld); *Everson* v. *Bd. of Education*, 330 U. S. 1 (1947) (holding that a township may reimburse parents for the cost of transporting their children to parochial schools).

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code §16–1—20.1, freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. See *ante*, at 18, n. 43. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. See *post*, at 11 (O'CONNOR, J., concurring in the judgment). But, as noted in the Court's opinion, the religious purpose of § 16–1—20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. See *ante*, at 19.

I also consider it of critical importance that neither the District Court nor the Court of Appeals found a secular purpose, while both agreed that the purpose was to advance religion. In its first opinion (enjoining the enforcement of § 16–1—20.1 pending a hearing on the merits), the District Court said that the statute did "not reflect a clearly secular purpose."

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[6] The Court's opinion recognizes that "a statute motivated in part by a religious purpose may satisfy the first criterion." *Ante*, at 17. The Court simply holds that "a statute must be invalidated if it is *entirely motivated* by a purpose to advance religion." *Ibid.* (emphasis added).

Jaffree v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982). Instead, the District Court found that the enactment of the statute was an "effort on the part of the State of Alabama to encourage a religious activity."[7] *Ibid.* The Court of Appeals likewise applied the *Lemon* test and found "a lack of secular purpose on the part of the Alabama legislature." *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535 (CA11 1983). It held that the objective of § 16–1—20.1 was the "advancement of religion." *Ibid.* When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.

I would vote to uphold the Alabama statute if it also had a clear secular purpose. See *Mueller* v. *Allen*, —— U. S. ——, —— (1983) (the Court is "reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute"). Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any non-religious reason for the statute's enactment.[8] Under these circumstances, the Court is required by our precedents to hold that the statute fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

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[7] In its subsequent decision on the merits, the District Court held that prayer in the public schools—even if led by the teacher—did not violate the Establishment Clause of the First Amendment. The District Court recognized that its decision was inconsistent with *Engle* v. *Vitale*, 370 U. S. 421 (1962), and other decisions of this Court. The District Court nevertheless ruled that its decision was justified because "the United States Supreme Court has erred . . . ." *Jaffree* v. *Bd. of School Comm'rs*, 554 F. Supp. 1104 (S. D. Ala. 1983).

In my capacity as Circuit Justice, I stayed the judgment of the District Court pending appeal to the Court of Appeals for the Eleventh Circuit. *Jaffree* v. *Bd. of School Comm'rs*, —— U. S. —— (1983) (POWELL, J., in chambers).

[8] Instead, the State criticizes the *Lemon* test and asserts that "the principal problem [with the test] stems from the *purpose* prong." See Brief of Appellant George C. Wallace, p. 9 *et seq.*

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect" of a straightforward moment-of-silence statute is unlikely to "advanc[e] or inhibi[t] religion."[9] See *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). Nor would such a statute "foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, *supra*, at 612–613, quoting *Walz* v. *Tax Commissioner*, 397 U. S. 664, 674 (1970).

I join the opinion and judgment of the Court.

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[9] If it were necessary to reach the "effects" prong of *Lemon*, we would be concerned primarily with the effect on the minds and feelings of immature pupils. As JUSTICE O'CONNOR notes, during "a moment of silence a student who objects to prayer [even where prayer may be the purpose] is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Post*, at 7 (O'CONNOR, J., concurring in the judgment). Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple "moment of silence" as a time for religious prayer. There are too many other subjects on the mind of the typical child. Yet there also is the likelihood that some children, raised in strongly religious families, properly would use the moment to reflect on the religion of his or her choice.

SUPREME COURT OF THE UNITED STATES

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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16–1–20, which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16–1–20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the Courts below and the history of its enactment, § 16–1–20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and

sponsor voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause of the First Amendment validate the Alabama law struck down by the Court today.

I

The religion clauses of the First Amendment, coupled with the Fourteenth Amendment's guaranty of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty. See *Engle* v. *Vitale*, 370 U. S. 421, 430 (1962). On these principles the Court has been and remains unanimous.

As this case once again demonstrates, however, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). It once appeared that the Court had developed a workable standard by which to identify impermissible government establishments of religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under the now familiar *Lemon* test, statutes must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion, and in addition they must not foster excessive government entanglement with religion. *Id.*, at 612–613. Despite its initial promise, the *Lemon* test has proven problematic. The required inquiry into "entanglement" has been modified and questioned, see *Mueller* v. *Allen*, 463 U. S. 388, 403 n. 11 (1983), and in one case we

have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. *Marsh* v. *Chambers*, 463 U. S. 783 (1983). The author of *Lemon* himself apparently questions the test's general applicability. See *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). JUSTICE REHNQUIST today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a "state" or "national" one. *Post*, at ——.

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 332–333 (1963) (footnotes omitted). Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch* v. *Donnelly*, 465 U. S., at —— (concurring opinion).

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored mem-

bers of the political community." *Id.*, at ——. Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engle* v. *Vitale*, 370 U. S., at 431. At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

A

Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.[1] A few statutes provide that the moment of silence is for the purpose of meditation alone. See Ariz. Rev. Stat. Ann. § 15–522 (1984); Conn. Gen. Stat. § 10–16a (1983); R. I. Gen. Laws § 16–12–3.1 (1981). The typical statute, however, calls for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. See, *e. g.*, Ark. Stat. Ann. § 80–1607.1 (1980); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat. ch. 122, § 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72–5308a (1980); Pa. Stat. Ann., Tit. 24, § 15–1516.1 (Purdon Supp. 1984). Federal trial courts have divided on the constitutionality of these moment of silence laws. Compare *Gaines* v. *Anderson*, 421 F. Supp. 337 (Mass. 1976) (upholding statute) with *May* v. *Cooperman*, 572 F. Supp. 1561 (NJ 1983) (striking down statute); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (NM 1983) (same); and *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn.

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[1] See Ala. Code §§ 16–1–20, 16–1–20.1 (Supp. 1984): Ariz. Rev. Stat. Ann. § 15–522 (1984); Ark. Stat. Ann. § 80–1607.1 (1980); Conn. Gen. Stat. § 10–16a (1983); Del. Code Ann., Tit. 14, § 4101 (1981) (as interpreted in Del. Op. Atty. Gen. 79–I011 (1979)); Fla. Stat. § 233.062 (1983); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat., ch. 122, ¶ 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115(A) (West 1982); Me. Rev. Stat. Ann., Tit. 20–A, § 4805 (1983); Md. Educ. Code Ann. § 7–104 (1985); Mass. Gen. Laws Ann., ch. 71, § 1A (1982); Mich. Comp. Laws Ann. § 380.1565 (Supp. 1984–1985); N. J. Stat. Ann. § 18A:36–4 (West Supp. 1984–1985); N. M. Stat. Ann. § 22–5–4.1 (1981); N. Y. Educ. Law § 3029–a (McKinney 1981); N. D. Cent. Code § 15–47–30.1 (1981); Ohio Rev. Code Ann. § 3313.60.1 (1980); Pa. Stat. Ann., Tit. 24, § 15.1516.1 (Purdon Supp. 1984–1985); R. I. Gen. Laws § 16–12–3.1 (1981); Tenn. Code Ann. § 49–6–1004 (1983); Va. Code § 22.1–203 (1980); W. Va. Const., Art. III, § 15–a. For a useful comparison of the provisions of many of these statutes, see Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N. Y. U. L. Rev. 364, 407–408 (1983).

1982) (same). See also *Walter* v. *West Virginia Board of Education*, Civ. Action No. 84–5366 (SD W. Va., Mar. 14, 1985) (striking down state constitutional amendment). Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, see *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), *Engle* v. *Vitale*, *supra*, the courts that have struck down the moment of silence statutes generally conclude that their purpose and effect is to encourage prayer in public schools.

The *Engle* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those cases, public school teachers and students led their classes in devotional exercises. In *Engle*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U. S., at 425. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that authorized morning Bible readings in public schools. The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. 374 U. S., at 223–224. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity. The decisions acknowledged the coercion implicit under the statutory schemes, see *Engle*, *supra*, at 431, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.

A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated

with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 281 (BRENNAN, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and goverment"); L. Tribe, American Constitutional Law § 14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich. L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there"). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem ines-

capable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.[2] This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. *Lynch*, 465 U. S., at —— (concurring opinion) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

Before reviewing Alabama's moment of silence law to determine whether it endorses prayer, some general observations on the proper scope of the inquiry are in order. First, the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. See *Everson* v. *Board of Education*, 330 U. S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose). In

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[2] Appellants argue that *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) suggests there is no constitutional infirmity in a State's encouraging a child to pray during a moment of silence. The cited dicta from *Zorach*, however, is inapposite. There the Court stated that "When the state encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs*, it follows the best of our traditions." *Ibid.* (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise. See *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963).

determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators. See *McGowan* v. *Maryland*, 366 U. S. 420, 466 (1961) (opinion of Frankfurter, J.). If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history,[3] or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence,[4] then courts should generally defer to that stated intent. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973); *Tilton* v. *Richardson*, 403 U. S. 672, 678–679 (1971). It is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson* v. *Arkansas*, 393 U. S. 97, 108 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

JUSTICE REHNQUIST suggests that this sort of deferential inquiry into legislative purpose "means little," because "it only requires the legislature to express any secular purpose and omit all sectarian references." *Post*, at ——. It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the

[3] See, *e. g.*, Tenn. Code Ann. § 49–6–1004 (1983).

[4] See, *e. g.*, W. Va. Const., Art. III, § 15–a.

Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Second, the *Lynch* concurrence suggested that the effect of a moment of silence law is not entirely a question of fact:

> "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." 465 U. S., at —— (concurring opinion).

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. ——, —— n. 1 (REHNQUIST, J., dissenting) (noting that questions whether fighting words are "likely to provoke the *average* person to retaliation," *Street* v. *New York*, 394 U. S. 576, 592 (1969), and whether allegedly obscene material appeals to "prurient interests," *Miller* v. *California*, 413 U. S. 15, 24 (1973), are mixed questions of law and fact that are properly subject to

de novo appellate review). A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16–1–20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

In finding that the purpose of Alabama Code § 16–1–20.1 is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited from State Senator Donald G. Holmes during a preliminary injunction hearing. *Ante*, at ——. Senator Holmes testified that the sole purpose of the statute was to return voluntary prayer to the public schools. For the reasons expressed above, I would give little, if any, weight to this sort of evidence of legislative intent. Nevertheless, the text of the statute in light of its official legislative history leaves little doubt that the purpose of this statute corresponds to the purpose expressed by Senator Holmes at the preliminary injunction hearing.

First, it is notable that Alabama already had a moment of silence statute before it enacted § 16–1–20.1. See Ala. Code § 16–1–20, reprinted *ante*, at ——, n. 1. Appellees do not challenge this statute—indeed, they concede its validity. See Brief for Appellees 2. The only significant addition

made by Alabama Code § 16–1–20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." App. 50. Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State of Alabama conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. See *ante*, at ——, n. 44. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended Alabama Code § 16–1–20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence.[5] While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U. S., at —— (concurring opinion), it also seems likely that the message actually conveyed to objective observers by Alabama Code § 16–1–20.1 is approval of the child

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[5] THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16–1–20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." *Post*, at ——. I disagree. In my view, the words "under God" in the Pledge, as codified at 36 U. S. C. § 172, serve as a acknowledgement of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." *Lynch*, 465 U. S., at —— (concurring opinion).

I also disagree with THE CHIEF JUSTICE's suggestion that the Court's opinion invalidates any moment of silence statute that includes the word "prayer." *Post*, at ——. As noted *infra*, at ——, "[e]ven if a statute specifies that a student may choose to pray during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."

who selects prayer over other alternatives during a moment of silence.

Given this evidence in the record, candor requires us to admit that this Alabama statute was intended to convey a message of state encouragement and endorsement of religion. In *Walz* v. *Tax Comm'n*, 397 U. S., at 669, the Court stated that the religion clauses of the First Amendment are flexible enough to "permit religious exercise to exist without sponsorship and without interference." Alabama Code § 16–1–20.1 does more than permit prayer to occur during a moment of silence "without interference." It endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise. For that reason, I concur in the judgment of the Court.

II

In his dissenting opinion, *post*, at ——, JUSTICE REHNQUIST reviews the text and history of the First Amendment religion clauses. His opinion suggests that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights. He urges the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause, an interpretation that presumably would permit vocal group prayer in public schools. See generally R. Cord, Separation of Church and State (1982).

The United States, in an *amicus* brief, suggests a less sweeping modification of Establishment Clause principles. In the Federal Government's view, a state sponsored moment of silence is merely an "accommodation" of the desire of some public school children to practice their religion by praying silently. Such an accommodation is contemplated by the First Amendment's guaranty that the Government will not prohibit the free exercise of religion. Because the moment of silence implicates free exercise values, the United States suggests that the *Lemon*-mandated inquiry into purpose and

effect should be modified. Brief for United States as *Amicus Curiae* 22.

There is an element of truth and much helpful analysis in each of these suggestions. Particularly when we are interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Whatever the provision of the Constitution that is at issue, I continue to believe that "fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible." *Tennessee* v. *Garner*, 471 U. S. ——, —— (1985) (dissenting opinion). The Court properly looked to history in upholding legislative prayer, *Marsh* v. *Chambers*, 463 U. S. 783 (1983), property tax exemptions for houses of worship, *Walz* v. *Tax Comm'n*, *supra*, and Sunday closing laws, *McGowan* v. *Maryland*, 366 U. S. 420 (1961). As Justice Holmes once observed, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

JUSTICE REHNQUIST does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually non-existent in the late eighteenth century. See *Abington*, 374 U. S., at 238, and n. 7 (BRENNAN, J., concurring). Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools. Sky, The Establishment Clause, the Congress, and the Schools: An Historical Perspective, 52 Va. L.

Rev. 1395, 1403–1404 (1966). Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold. *Brown* v. *Board of Education*, 347 U. S. 483, 489–490 (1954).

This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. The Court has not done so. See, *e. g.*, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring). When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools.[6] I think not. At the very least, Presidential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. See, *e. g.*, *Marsh* v. *Chambers*, *supra*, at ——; *Tilton* v. *Richardson*, 403 U. S., at 686. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

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[6] Even assuming a taxpayer could establish standing to challenge such a practice, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), these Presidential proclamations would probably withstand Establishment Clause scrutiny given their long history. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion. Our cases have interpreted the Free Exercise Clause to compel the Government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. See, *e. g.*, *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). The challenge posed by the United States' argument is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights. Indeed, the statute at issue in *Lemon*, which provided salary supplements, textbooks, and instructional materials to Pennsylvania parochial schools, can be viewed as an accommodation of the religious beliefs of parents who choose to send their children to religious schools.

It is obvious that the either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*, 397 U. S., at 668–669. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), *Board of Education* v. *Allen*, 392 U. S. 236 (1968). It is difficult to square any notion of "complete neutrality," *ante*, at ——, with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion. See *Welsh* v. *United States*, 398 U. S. 333, 372 (1970) (WHITE, J., dissenting).

The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *ante*, at ——, is acquainted with the Free Exercise Clause and the values it promotes. Thus indi-

vidual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16–1–20.1. No law prevents a student who is so inclined from praying silently in public schools. Moreover, state law already provided a moment of silence to these appellees irrespective of Alabama Code § 16–1–20.1. See Ala. Code § 16–1–20. Of course, the State might argue that § 16–1–20.1 protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause as interpreted in *Engle* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

III

The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer.

This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it. In my view, the judgment of the Court of Appeals must be affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance

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than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including this Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence," *ante*, at 12 (O'CONNOR, J., concurring in the judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. The Alabama legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to God. Today's decision recalls the observations of Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."
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> *School District* v. *Schempp*, 374 U. S. 203, 306 (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama legislature. Rather than determining legislative purpose from the face of the statute as a whole,[1] the opinions rely on three factors in concluding that the Alabama legislature had a "wholly religious" purpose for enacting the statute under review, Ala. Code § 16–1–20.1 (Supp. 1984): (i) statements of the statute's sponsor, (ii) admissions in Governor James' Answer to the Second Amended Complaint, and (iii) the difference between § 16–1–20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon—including the statement "inserted" into the Senate Journal—were made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede, see Brief for Appellees 18, there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill

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[1] The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose* of meditation *or* voluntary prayer at the commencement of the first class of each day in all public schools." 1981 Ala. Senate J. 14 (emphasis added). See also *id.*, at 150, 307, 410, 535, 938, 967.

was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. See App. 53–54. That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

The Court also relies on the admissions of Governor James' Answer to the Second Amended Complaint. Strangely, however, the Court neglects to mention that there was no trial bearing on the constitutionality of the Alabama statutes; trial became unnecessary when the District Court held that the Establishment Clause does not apply to the states.[2] The absence of a trial on the issue of the constitutionality of § 16–1–20.1 is significant because the Answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's Answer made. See 1 Record 187. The Court cannot know whether, if this case had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's Answer.

The several preceding opinions conclude that the principal difference between § 16–1–20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in § 16–1–20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the

[2] The four days of trial to which the Court refers concerned only the alleged practices of vocal, group prayer in the classroom.

statutory Pledge of Allegiance 31 years ago to add the words "under God." Act of June 14, 1954, Pub. L. 396, 68 Stat. 249. Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between § 16–1–20.1 and its predecessor statute rather than examining § 16–1–20.1 as a whole.[3] Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16–1–20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[4]

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). In any event, our responsibility is not to apply tidy formulas

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[3] The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that "our people and our Government [are dependent] upon the moral directions of the Creator." H. R. Rep. No. 1693, 83d Cong., 2d Sess. 2, reprinted in 1954 U. S. Code Cong. & Admin. News 2339, 2340. If this is simply "acknowledgement," not "endorsement," of religion, see *ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment), the distinction is far too infinitesimal for me to grasp.

[4] The several opinions suggest that other similar statutes may survive today's decision. See *ante*, at 20; *ante*, at 1–2 (POWELL, J., concurring); *ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment). If this is true, these opinions become even less comprehensible, given that the Court holds this statute invalid when there is no legitimate evidence of "impermissible" purpose; there could hardly be less evidence of "impermissible" purpose than was shown in this case.

by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District* v. *Schempp*, 374 U. S. 203, 308 (1963) (concurring opinion). The innocuous statute that the Court strikes down does not even rise to the level of

"mere shadow." JUSTICE O'CONNOR paradoxically acknowledges, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Ante*, at 7.[5] I would add to that, "even if they choose to pray."

The mountains have labored and brought forth a mouse.[6]

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[5] The principal plaintiff in this action has stated: "'I probably wouldn't have brought the suit just on the silent meditation or prayer statute . . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity.'" Malone, Prayers for Relief, 71 A.B.A. J. 61, 62, col. 1 (Apr. 1985) (quoting Ishmael Jaffree).

[6] Horace, Epistles, bk. III (Ars Poetica), line 139.

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE WHITE, dissenting.

For the most part agreeing with the opinion of the Chief Justice, I dissent from the Court's judgment invalidating Alabama Code § 16–1–20.1. Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

I appreciate JUSTICE REHNQUIST's explication of the history of the religion clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.

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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation be-

tween church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).[1]

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the thirteen colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general government carried with it a potential for tyranny. The typical response

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[1] *Reynolds* is the only authority cited as direct precedent for the "wall of separation theory." 330 U. S., at 16. *Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law.

to this argument on the part of those who favored ratification was that the general government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the eleven colonies which ratified the Constitution by early 1789, five proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom. See 3 J. Elliot, Debates on the Federal Constitution 659 (1891); 1 *id.*, at 328. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. 1 *id.*, at 334; 4 at 244. Virginia and North Carolina proposed identical guarantees of religious freedom:

> "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 *id.*, at 659; 4 *id.*, at 244.[2]

On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 Annals of Cong. 424. Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. He said, *inter alia*:

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[2] The New York and Rhode Island proposals were quite similar. They stated that no particular "religious sect or society ought to be favored or established by law in preference to others." 1 Elliot's Debates, at 328; *id.*, at 334.

> "It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished." *Id.*, at 431–432.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*, at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a committee of the whole, and after

several weeks' delay were then referred to a Select Committee consisting of Madison and ten others. The Committee revised Madison's proposal regarding the establishment of religion to read:

> "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the "Annals," and does not seem particularly illuminating. See *id.*, at 729–731. Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency "to abolish religion altogether." Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read "that no religious doctrine shall be established by law." *Id.*, at 729. Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill or Rights—that Congress had no delegated authority to "make religious establishments"—and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."

Madison then spoke, and said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on the "necessary and proper" clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and

he thought it as well expressed as the nature of the language would admit." *Ibid.*

Representative Benjamin Huntington then expressed the view that the Committee's language might "be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it." Huntington, from Connecticut, was concerned that in the New England states, where state established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.*, at 730–731.

Madison responded that the insertion of the word "national" before the word "religion" in the Committee version should satisfy the minds of those who had criticized the language. "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." *Id.*, at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that "Congress shall make no laws touching religion, or infringing the rights of conscience." *Ibid.*

Representative Gerry spoke in opposition to the use of the word "national" because of strong feelings expressed during the ratification debates that a federal government, not a national government, was created by the Constitution. Madi-

son thereby withdrew his proposal but insisted that his reference to a "national religion" only referred to a national establishment and did not mean that the goverment was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. *Ibid.*

The following week, without any apparent debate, the House voted to alter the language of the Religion Clause to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789 considered several different forms of the Religion Amendment, and reported this language back to the House:

> "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The House and the Senate both accepted this language on successive days, and the amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the members of the House of the amendments which became the Bill or Rights,

but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.[3] His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter day commentators have ascribed to him. His explanation on the floor of the meaning of his language—"that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the

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[3] In a letter he sent to Jefferson in France, Madison stated that he did not see much importance in a Bill of Rights but he planned to support it because it was "anxiously desired by others . . . [and] it might be of use, and if properly executed could not be of disservice." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and, *inter alia*, *Engel* v. *Vitale*, 370 U. S. 421 (1962), does not make it any sounder historically. Finally, in *Abington School District* v. *Schempp*, 374 U. S. 203, 214 (1963) the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams came to be incorporated not only in the Federal Constitution but likewise in those of most of our States" (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.[4] And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concern about whether the Government might aid all religions evenhandedly. If one were to follow the advice of JUSTICE BRENNAN,

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[4] State establishments were prevalent throughout the late Eighteenth and early Nineteenth Centuries. See Massachusetts Constitution of 1780, Part, 1, Art. III; New Hampshire Constitution of 1784, Art. VI; Maryland Declaration of Rights of 1776, Art. XXXIII; Rhode Island Charter of 1633 (superseded 1842).

concurring in *Abington School District* v. *Schempp*, *supra* at 236, and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The actions of the First Congress, which re-enacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n.(a). Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools. 5 Stat. 788; Antieau, Downey, & Roberts, Freedom From Federal Establishment, at 163.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clause

which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." 1 Annals of Cong. 914 (1789). Representative Aedanas Burke objected to the resolution because he did not like "this mimicking of European customs"; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the states knew better than the Congress, and in any event "it is a religious matter, and, as such, is proscribed to us." *Id.*, at 915. Representative Sherman supported the resolution "not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion . . . ." *Ibid.*

Boudinot's resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clause; Tucker, who opposed the Thanksgiving proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety

and happiness." 1 J. Richardson, Messages and Papers of the Presidents, 1789–1897, p. 64 (1897). The Presidential proclamation was couched in these words:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
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> "And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion

> and virtue, and the increase of science among them and us; and, generally, to grant until all mankind such a degree of temporal prosperity as He alone knows to be best." *Ibid.*

George Washington, John Adams, and James Madison all issued Thanksgiving proclamations; Thomas Jefferson did not, saying:

> "Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church.[6] It was not until 1897, when aid to sectarian

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[6] The Treaty stated in part:

"*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." 7 Stat. 79.

From 1789 to 1823 the U. S. Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Bretheren for propagating the Gospel among the Heathen." See, *e. g.*, ch. 46, 1 Stat. 490. The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. See 1 Stat. 257. In 1833 Congress authorized the State of Ohio to sell the land

education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. See Act of June 7, 1897, 30 Stat. 62, 79.; cf. *Quick Bear* v. *Leupp*, 210 U. S. 50, 77–79 (1908); J. O'Neill, Religion and Education Under the Constitution 118–119 (1949). See generally R. Cord, Separation of Church and State 61–82 (1982). This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form. 330 U. S. at 15–16.

Joseph Story, a member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630–632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> . . . . .
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> "The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent

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set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ." 4 Stat. 618–619.

any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ." (Footnotes omitted.)

Thomas Cooley's eminence as a legal authority rivaled that of Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

"But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or

sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. . . ." *Id.*, at 470–471.

Cooley added that,

"[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order." *Id.*, at 470.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordainin(g,") such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause

cases have been neither princpled nor unified. Our recent opinions, many of them hopelessly divided pluralities,[6] have with embarassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Tilton* v. *Richardson*, 403 U. S. 672, 677–678, (1971); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Lynch* v. *Donnelly*, 465 U. S. ——, (1984).

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," ante at 14, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson*'s wall through the three-part test of *Lemon* v.

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[6] *Tilton* v. *Richardson* 403 U. S. 672, 677 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (partial); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736 (1976); *Wolman* v. *Walter*, 433 U. S. 229 (1977).

Many of our other Establishment Clause cases have been decided by bare 5–4 majorities. *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980); *Larson* v. *Valente*, 456 U. S. 228 (1982); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Lynch* v. *Donnelly*, 465 U. S. —— (1984); *cf. Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973).

Kurtzman, *supra*, at 614–615, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion. *E. g.*, *Lemon*, *supra*.

Lemon cited *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968), as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. See *Allen*, *supra*, at 243. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so. *Larson* v. *Valente*, 456 U. S. 228, 262–263 (1982) (WHITE, J., dissenting).

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether

stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld. *E. g., Allen, supra.*

The entanglement prong of the *Lemon* test came from *Walz* v. *Tax Commission*, 397 U. S. 664, 674 (1970). *Walz* involved a constitutional challenge to New York's time-honored practice of providing state property tax exemptions to church property used in worship. The *Walz* opinion refused to "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history," *id.*, at 671, and upheld the tax exemption. The Court examined the historical relationship between the state and church when church property was in issue, and determined that the challenged tax exemption did not so entangle New York with the Church as to cause an intrusion or interference with religion. Interferences with religion should arguably be dealt with under the Free Excercise Clause, but the entanglement inquiry in *Walz* was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz's* reflective inquiry into entanglement, however. *E. g., Wolman*, 433 U. S., at 254. One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). For example, in *Wolman*, *supra*, the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision of sectarian officials in charge of field trips would be too

onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test as applied in cases like *Wolman* also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, see *supra*, n. 6, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[7] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[8] A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history

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[7] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

[8] *Meek*, 421 U. S., at 362–366. A science book is permissible, a science kit is not. See *Wolman*, 433 U. S., at 249.

class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[9] A State may pay for bus transportation to religious schools[10] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[11] A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, *Meek* v. *Pittenger*, 421 U. S. 349, 367, 371 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. *Wolman*, 433 U. S., at 241. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[12] such as in a trailer parked down the street. *Id.*, at 245. A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services,[13] but it may not provide funds for teacher-prepared tests on secular subjects.[14] Religious instruction may not be given in public school,[15] but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those clases with its truancy laws.[16]

These results violate the historically sound principle "that the Establishment Clause does not forbid governments . . . to [provide] general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid'

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[9] See *Meek*, *supra*, at 354–355, nn. 3, 4, 362–366.

[10] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

[11] *Wolman*, *supra*, at 252–255.

[12] *Wolman*, *supra*, at 241–248; *Meek*, *supra*, at 352, n. 2, 367–373.

[13] *Regan*, 444 U. S., at 648, 657–659.

[14] *Levitt*, 413 U. S., at 479–482.

[15] *Illinois ex rel.* v. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

[16] *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

religious instruction or worship." *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 799 (1973) (BURGER, C. J., concurring in part and dissenting in part). It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.

Although the test initially provided helpful assistance, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672 (1971), we soon began describing the test as only a "guideline," *Committee for Public Education* v. *Nyquist*, *supra*, and lately we have described it as "no more than [a] useful signpos[t]." *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983), citing *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). We have noted that the *Lemon* test is "not easily applied," *Meek*, *supra*, at 358, and as JUSTICE WHITE noted in *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980), under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U. S., at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it. 465 U. S., at ——, citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Larson* v. *Valente*, 456 U. S. 228 (1982).

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," *ante*, at 14, has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon* v. *Kurtzman*." *Regan*, *supra*, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. *Tilton*, *supra*. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. See *Walz*, 397 U. S., at 671–673; see also

Lynch, *supra*, at ——. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute in No. 83–812, *Wallace* v. *Jaffree*, because the State wished to "endorse prayer as a favored practice." *Ante*, at 21. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals in *Wallace* v. *Jaffree*.

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